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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAY LINDSAY, d/b/a MAC ADVERTISING COMPANY, *ET AL.*, *Petitioners*

v.

THE CITY OF SAN ANTONIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the court of appeals' opinion creates a presumption that any content-neutral governmental restriction on outdoor signs based on aesthetic interests is valid as against a challenge based on the First Amendment to the United States Constitution.

2. Whether the court of appeals' opinion conflicts with this Court's opinion in Central Hudson Gas v. Public Service Com'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), in shifting the burden of proof in First Amendment cases involving outdoor signs, from the governmental unit in question to show that the restriction on speech directly advances permissible governmental goals and goes no further than necessary to achieve those goals, to the party asserting its First Amendment rights.

3. Whether the court of appeals' decision conflicts with previous court of appeals' decisions of the Eleventh Circuit in Dills v. Cobb County, Ga., 755 F.2d 1473 (11th Cir. 1985) and Dills v. City of Marietta, Ga., 674 F.2d 1377 (1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983).

4. Whether the rule announced in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) requiring that courts of appeal examine the whole record of a proceeding to assure that First Amendment rights are not intruded upon was properly applied to overturn a district court's preliminary injunction protecting Petitioners' rights to free expression.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: Jay Lindsay d/b/a MAC Advertising Company, Mike Swiercinsky d/b/a Trail-A-Way Signs, and Tom Lockridge d/b/a Better Sign Rentals, plaintiffs/appellees; and the City of San Antonio, defendant/appellant.

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No.

JAY LINDSAY, d/b/a MAC ADVERTISING COMPANY, ET AL., Petitioners

v.

THE CITY OF SAN ANTONIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jay Lindsay, et al., petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on July 17, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-37a) is reported at 821

F.2d 1103. The order and memorandum opinion of the district court is reprinted in the appendix hereto, pgs 38a-67a.

JURISDICTION

The judgment of the court of appeals (App., infra, 68a-69a) was entered on July 17, 1987. On September 4, 1987, Judge Randall denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (App., infra, 70a-72a). Upon motion of the petitioners, the court of appeals granted on September 23, 1987, a stay of the mandate to and including October 23, 1987, pending application for writ of certiorari. (App., infra, 73a-75a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the application of the First Amendment of the United States Constitution which reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. COURSE OF PROCEEDINGS

Petitioners are in the business of supplying, leasing, renting and selling portable signs in San Antonio, Texas. They brought a lawsuit challenging the constitutionality of City of San Antonio Ordinance No. 62652, which prohibited further placement of portable signs not already in place on September 22, 1985. Petitioners alleged that the ordinance violated their First Amendment rights of

freedom of speech, denied them equal protection and due process under the Fourteenth Amendment and impaired their contract rights under Article I, Section 10, Clause I, of the U.S. Constitution. In conjunction with their complaint, the petitioners sought a preliminary injunction against the enforcement of the ordinance pending the final trial. Further, they alleged that if the ordinance were enforced, they would be forced out of business.

Petitioners' request for a preliminary injunction was referred to the Magistrate on April 18, 1986, and on May 5, 1986, the City filed its answer. An evidentiary hearing on the request for preliminary injunction was held May 28 & 29, 1986, before the Honorable Dan A. Naranjo. After the hearing, the Magistrate submitted to the district court his proposed

findings of fact and conclusions of law and a recommendation that the motion of preliminary injunction be granted. On July 28, 1986, the City filed its objection and answer to the Magistrate's findings.

On August 13, 1986, the district court issued a preliminary injunction prohibiting the enforcement of the ordinance. (App., infra, 38a-39a). On September 12, 1986, the City filed its Notice of Appeal.

On April 7, 1987, the case was orally argued before the Honorable Carolyn D. Randall, the Honorable William L. Garwood and the Honorable W. Eugene Davis. By decision dated July 17, 1987, the appeals court reversed the district court's order issuing a preliminary injunction. (App. infra, 1a-37a).

2. REVIEW OF FACTS

The court of appeals conducted a de novo review of all the facts brought forward from the hearing on preliminary injunction. Nevertheless, the court simply concludes with reference to the record that, "Our review of the evidence would lead us to conclude, contrary to the result reached by the district court, that the record demonstrates that the ordinance does, in fact, further the City's aesthetic interest." (App., infra, 29a-30a).

Since the court of appeals goes on to cite only evidence which, in its own words, is "inconclusive" (Id. at 30a), petitioners will briefly describe the evidence adduced at that hearing.

At the evidentiary hearing, Petitioner Jay Lindsay and Tom Lockridge testified, as well as Sharon Lee O'Bryan, a lessee of

portable signs. For the City, Gene Camargo, David Fisch, David Steitle, John R. Mosty and Christopher Powers testified.

a. Lindsay

Jay Lindsay, who is in the business of leasing portable signs, primarily rents his signs to small businessmen for on-site usage. They are also leased and used for noncommercial purposes. He estimated that the majority of his signs in place prior to September 22, 1985, had been returned and that for the last two years, he has used two types of anchoring devices for his portable signs. Since he began anchoring signs, only one of his portable signs has blown over. Lindsay mentioned other instances where property damage to signs and automobiles occurred, but stated that he was not aware of any personal injuries attributable to such accidents.

Although he had no problem with the stated goals in the City's ordinance, Lindsay offered suggestions and recommendations, less restrictive than a total ban, on regulating portable signs to accomplish the City's goals. If portable signs were banned, however, he claimed he would be forced out of business. Photographs were introduced into evidence which showed that some permanent (non-portable) and pole signs were traffic hazards, unattractive, aesthetically displeasing and subject to wind damage.

b. Lockridge

Tom Lockridge rents his signs for commercial and non-commercial uses, as well. When placed on business premises, his signs are anchored.

He testified that on occasion cars had damaged his signs, but he was unaware of any incidents where personal injuries were

sustained. Further, none of his signs have blown over since he began anchoring them.

Mr. Lockridge voiced support for Lindsay's proposed regulations, and although admitting they were strict, he would, if necessary, give up the electrical portable signs in his business.

c. Sharon Lee O'Bryan

A lessee of portable signs testified that the most effective type of advertising for her tax preparation business was portable signs. Although she had previously used a permanent sign for her business, it was too costly due to the periodic nature of her business. The fact that portable sign messages could be changed also helped her business. If forced to use other means of advertising, her business would lose profits.

d. Camargo

Witness Gene Camargo, director of the Department of Building Inspections for the City of San Antonio, was involved in the drafting of the portable sign ordinance in question. His committee asserted that portable signs created traffic and safety hazards and were more aesthetically displeasing than other on-premise signs. Construction problems with portable signs made the signs, in his opinion, quite unsightly. He admitted, however, that if the construction materials were of a certain quality, he would have no problem with the design of portable signs. It was also admitted that the City could inspect the construction materials of portable signs before they were placed.

Only a few incidents of damages purportedly caused by portable signs were offered by the City. One incident was

mentioned by Mr. Camargo where an unanchored portable sign had been blown over and caused some property damage. Another involved a traffic accident allegedly caused by a portable sign obstructing a driver's vision. He knew of no incident where portable signs caused personal injury.

Camargo viewed the placement of portable signs as contributing to the traffic safety hazard. However, he acknowledged that the hazard would be removed if the portable sign was placed in a similar position as a permanent on-site commercial sign. While claiming that a visual obstruction would occur with a portable sign placed approximately 4 feet above the ground but not with a pole sign located 8 1/2 feet above the ground, he admitted that the height difference between the two signs would not matter if they were placed

back far enough from the road way.

He also conceded that the city's traffic safety concerns would be promoted if portable signs were required to be anchored and the electrical components were regulated or removed. And, he acknowledged that, if the City was desirous of having two sets of standards for construction of on-premise signs, regulations could be developed concerning the placement of portable signs to remove the traffic hazard.

Photographs were identified by Camargo which showed commercial pole signs in violation of the minimum height requirement of the ordinance. He also admitted that more violations probably existed in the City than were represented by Plaintiff's photographs. These permanent sign height violations could pose a traffic hazard.

Photographs of permanent signs were also identified as being aesthetically displeasing.

The City's decision to ban portable signs was discussed. Limited consideration was given by the City on less restrictive means of regulating portable signs short of a total ban. Rather, Camargo admitted that his committee had been directed by the City Council to draft a regulation that would eliminate portable signs.

e. David Fisch

The City called David Fisch to testify about the traffic accident he was involved in. He claimed that his view had been blocked by a portable sign.

Fisch stated that he saw the portable sign to his left, saw no cars coming from that direction, looked right, and then pulled out on to the main thoroughfare.

The accident report indicated that Mr. Fisch failed to yield the right of way. No reference was made of a portable sign. He did not attempt to pull out farther to look down the road. The car had almost passed him at the time he collided with it in the rear quarter panel.

f. David C. Steitle

The Assistant Director of Public Works for the City of San Antonio testified to a series of photographs which he took, some of which he claimed demonstrated dangerous or hazardous traffic conditions. The direct examination of this witness is incomplete and the cross-examination is entirely missing due to a malfunction of the recording system.

g. John R. Mosty

The importance of tourism in San Antonio and its relationship to the natural beauty

and aesthetics of San Antonio was testified to by John R. Mosty, the Executive Director of San Antonio Convention Visitors Bureau. It was Mosty's opinion that portable signs were aesthetically displeasing as they are an obstacle to the natural beauty. Yet, despite their existence, the tourist industry in San Antonio is growing daily. The Convention and Visitors Bureau gathers information from tourists concerning their reasons for visiting San Antonio. Mosty, however, made no personal inquiries of visitors concerning portable signs, nor did any of the individuals whom he hired to do this research inquire of visitors concerning their views on portable signs.

h. Christopher Powers

The City called Christopher Powers, a planner with the Comprehensive Planning Section of the City Planning Department,

who testified that his section deals with land use planning for the City of San Antonio. His section had input into the portable sign ordinance. It was his opinion that the total ban on portable signs was a proper way to deal with the aesthetic problem. He found portable signs aesthetically displeasing as the border and sign face did not mesh with any particular area. But, he acknowledged that some commercial signs also have black borders with yellow and white faces. Arguing that several portable signs assembled together at one commercial location would impart a visual clutter, Powers admitted that the City could enact an ordinance which would regulate the number of signs per commercial establishment. Powers also conceded that there were commercial signs that are individually displeasing.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and recurring importance regarding the protection of the First Amendment afforded to outdoor signs. At issue is the validity of a total ban on portable signs enacted for the stated purpose of advancing the aesthetic interests of the City of San Antonio. Including the case at bar, there are currently at least four cases, in various circuits and at various stages of development, pending in the federal court system concerning the same or similar issues.[1] Further, there are conflicting district court and appellate decisions in and out of the Eleventh Cir-

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[1] Don's Porta-Signs, Inc., et al. v. City of Clearwater, ____F.2d____ (11th Cir. 1987), (App. 76a-88a); John G. Grillet dba Austin Adver-Sign v. The City of Austin, Civil Action No. A-87-CA-068, (W.D. Tex. - Austin Division, 1987); Mobile Sign, Inc. et al. v. Town of Brookhaven, ____F.Supp.____ (E.D. N.Y. 1987) (App. 89a-118a)

cuit on the issue and some of those cases are in conflict with the court of appeals' opinion in the instant case.[2] Certiorari should be granted to provide guidance and certainty to this area of the law.

1. The court of appeals has criticized the district court's finding that the

> "...aesthetic appearance of the City will imperceptibly change, at best, if portable signs are eliminated since portable signs appear to represent a small fraction of the total number of sign advertisements." (App.49a).

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2 See Signs, Inc. of Florida v. Orange County, Fla., 592 F.Supp. 693 (M.D. Fla. 1983) (invalidating a total ban on First Amendment grounds); All American Sign Rentals, Inc. v. City of Orlando, 592 F.Supp. 85 (M.D. Fla. 1983) (finding unconstitutional an ordinance with time and setback requirements for portable signs as it failed to effect traffic safety or aesthetics); A-Deal, Inc. v. City of Sherwood, et al., (App. 119a-145a), (E.D. Ark. 1987). Civ. Action No. LR-C-86-227, (granting permanent injunction against ordinance with time restrictions on portable signs); Mobile Sign, Inc. et al. v. Town of Brookhaven, ____ F.Supp. ____ (E.D. N.Y. 1987) (App. 89a-118a) (upholding ordinance with time and setback requirements on mobile signs).

The court takes the position that in making this determination the district court succumbed to the temptation to accord insufficient deference to the city council of San Antonio which made its determination of aesthetic values. [3] Further, the court holds that it is not, in any event, bound by such a determination. (Id. at 29a). It also holds that the ordinance does further the City's objective of improving its aesthetic interest, (Id. at 29a-30a), but does not point out the evidence it relies on for so finding. In fact, the only evidence

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[3] Petitioners would point out that the City never specified what its aesthetic interest was in eliminating the portable sign but simply relied on a broadly worded, stated purpose in the commentary to the ordinance itself. The commentary states: Prohibiting further placement of portable signs is desired because they are not consonant with aesthetic values of the community and because they present unique safety problems.

referred to in the court of appeals' decision is described as "inconclusive". (Id. at 30a).

Under Central Hudson Gas v. Public Service Com'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the burden was on the City of San Antonio to establish that its ordinance was directly related to its stated goal of furthering the aesthetic interests of San Antonio and that it goes no further than necessary to achieve that goal. Since it appears that the Fifth Circuit reviewed the evidence as essentially inconclusive, the City did not meet the burden imposed by Central Hudson and therefore, the preliminary injunction should have been upheld.

The reason that it was not upheld is the key issue before this Court. The logical interpretation of the court of appeals' decision is that in the context of outdoor

signs the court has shifted the Central Hudson burden of proof from the governmental unit to the citizen whose First Amendment liberties are being infringed upon. This amounts to a presumption in favor of the validity of this type of government restriction on speech.

Additionally, in addressing the 4th prong of the Central Hudson test, the court of appeals took this court's holding in Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) and interpreted it as holding that outdoor signs are privileges which exist at the sufferance of the city in which they are located. Therefore, they hold, in effect, that an ordinance which reduces the number of outdoor signs, is ipso facto, both directly related to the

improvement of the aesthetics of the city, and not "substantially broader than necessary" to protect the City's aesthetic interests, since portable signs are apparently the source of the exact evil the City sought to prevent.

Based on a supposedly inconclusive record then, the court of appeals has defined outdoor signs, wherever located and however constructed, to be eyesores. It has further allowed cities unfettered discretion in deciding the method, manner and timing of the eradication of this (and any other) aesthetic harm, and has defined the elimination of those signs, on any basis of selection whatsoever, to be the most narrowly drawn regulation conceivable to accomplish this goal. Petitioners submit that this has the effect of eliminating the First Amendment protections on this form of speech as a matter of defini-

tion, and of this decision seek review by this Court.

2. As previously stated, San Antonio enacted an ordinance prohibiting further placement of portable signs not already in place on September 22, 1985. In effect, the ordinance totally banned a medium of communication - portable signs.

The panel, in reversing the decision of the trial court, relied on Vincent, supra, and Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800, to support its holding that the ordinance furthered the City's aesthetic goals and was not "substantially broader than necessary to protect the City's aesthetic interest." (App.34a). The panel has erred, not in its reliance of this precedent to the facts before it, but rather in its interpretation and application of the decisions to the facts of the case at bar.

These two cases deal with governmental restrictions on the use and placement of signs short of a total ban. In Vincent, this Court upheld a Los Angeles Municipal Code which prohibited the posting of signs, including political advertisements, on public property. Among other reasons, this Court held that this ban was not overly restrictive because it only affected public property and not private property. Id. at 811. The Court stated:

> "Moreover, by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs, and private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." Id.

In Metromedia, supra, this Court struck down an ordinance that permitted on-site

commercial advertising (including billboards) but forbade all other billboard advertising including on-site noncommercial advertising. The ordinance in so far as it regulated commercial speech was found to have met the third and fourth criteria of the Central Hudson test. Id. at 512. As to the ban on signs with noncommercial advertising, however, the Court found that the ordinance was invalid under the 1st and 14th amendments. Id. at 512-513.

Had the governmental restrictions under review in these two cases constituted a total ban, Petitioners suggest that this Court may have more strictly applied the fourth prong of Central Hudson thus reaching a different conclusion on the facts before it. This seems borne out by the fact that this Court in Metromedia reserved the question as to whether a total ban

of outdoor advertising would be consistent with the First Amendment. Id. at 514, 101 S.Ct. at 2896, n. 20. The Court referenced its decision in Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981), for the constitutional problem created by a total prohibition of a particular form of expression. This reference is well taken with respect to the case at bar because Schad articulates an analysis (applied in previous Supreme Court decisions)[4] concerning content-neutral, total ban of a particular means of communication. In Schad, this Court struck down a town's total ban on live commercial entertainment on First Amendment grounds, holding that the ordinance was not narrowly drawn and that the Borough had not shown that its

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[4] Justice Brennan's decision in Metromedia, 101 S.Ct. at 2902 provides a list of these cases.

interests could not be met by less intrusive restrictions." 452 U.S. at 74, 101 S.Ct. at 2186.

Although Metromedia and Vincent provide substantial clarification of principles bearing on the questions presented in this petition, there remain unresolved issues which provide this Court with an opportunity for further clarification of those principles in the context of a total ban case.

3. Further, this Court should grant review due to a conflict in decisions between the Fifth and Eleventh Circuit Court of Appeals concerning their review of regulations of outdoor signs. Not only is there a lack of uniformity between these circuits, but there is a conflict within the Eleventh Circuit as well.

In 1982 the Eleventh Circuit in Dills v. City of Marietta, Ga, 674 F.2d 1377

(1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983) held unconstitutional an ordinance which required the removal of portable signs after a specified number of days applying the 4-part commercial speech test in Metromedia. Confirming the district court's finding that there was an absence of evidence concerning aesthetic interests of the city, the appeals court refused to accept the city's "mere incantation of esthetics as a proper state purpose" for suppressing speech. Id. at 1381.

Finding that the ordinance failed to directly further the claimed interest in traffic safety, the court found that the time restriction on the use of portable signs would "exacerbate" their distracting quality by insuring that they would be used primarily to draw attention to special events. Id. at 1382. In

addition, the city's safety concerns of electrical signs being toppled in strong winds could be solved by less restrictive means, such as anchoring. Id. Although recognizing that the traffic safety interest was legitimate, the appeals court enjoined enforcement of the ordinance, because it was not narrowly tailored to directly further that interest. Id.

In Dills v. Cobb County, Ga., 593 F.Supp. 170 (N.D.Ga. 1984), aff'd 755 F.2d 1473 (11th Cir. 1985), the district court held a county sign ordinance establishing set-back requirements for portable signs unconstitutional. In analyzing the ordinance, the court determined that it constituted a content-neutral prohibition and that the appropriate standard to use when reviewing this type of regulation was set forth in Vincent, supra, Id. at 172. Applying this standard, the court found

that the evidence failed to establish that the ordinance furthered the county's interests in traffic safety or aesthetics. Id. at 175. Upon review of the record, the appeals court agreed with the district court that the county failed to sustain its burden of justifying its attempted abridgement of First Amendment rights. 755 F.2d 1473 at 1474.

Subsequent to the two Dills decisions, the Eleventh Circuit was again faced with a challenge to the constitutionality of a county ordinance banning portable signs in Harnish v. Manatee County, Fla., 783 F.2d 1535 (1986). The district court had determined that the ordinance was unconstitutional. In upholding the absolute ban, the appeals court cited Metromedia, Vincent, and Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) as

controlling its disposition of the appeal. Id. at 1539. Using these decisions for guidance, the appeals court determined that the total ban reasonably advanced the county's aesthetic goals. Id. at 1540. Having established that, and that there was no evidence in support of a finding that less restrictive means were available, the court held the district court erred in speculating that they were accessible. Id. The court did not address the safety issue as the ordinance was determined to be an appropriate means of regulating aesthetic blight. Id.

The most recent decision by the Eleventh Circuit which again addressed the question of the constitutionality of legislation banning portable signs, is Don's Porta-Signs, Inc., et al. v. City of Clearwater, ___ F.2d ___ (1987), (App. 76a-88a). In reversing the district court's ruling, the

appeals court agreed with the city's contention that Harnish, controlled its decision. (Id. at 83a). Giving deference to Harnish, and citing the principles enunciated in Metromedia, Vincent, and Lindsay, in review of the record, the court concluded that the regulation in question would assist in the elimination of visual clutter created by portable signs thus advancing the city's aesthetic interests. (Id. at 86a). Additionally, the court also concluded, as it had in Harnish, that the regulation banning portable signs was no more restrictive than necessary to accomplish its aesthetic goals. (Id. at 86a).

Neither the Harnish nor the Clearwater decisions cite or distinguish the prior Eleventh Circuit precedent in Dills I and II, supra. One is left to speculate as to how the same court could arrive at an

opposite conclusion when addressing similar facts and issues. The Fifth Circuit in Lindsay also fails to cite either Dills decision, though limited mention of Harnish is made.[5] Lower courts within and without the Fifth and Eleventh Circuits, when faced with this conflicting precedent and the lack of reasons for their distinction are without guidance as to which decisions to follow. This conflict can and should be resolved by this Court.

The decision in Harnish is in absolute conflict with the decision by the court in Dills v. Marietta, supra, due to its application of the 4th factor in the Central Hudson test. In Marietta, the

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[5] The Fifth Circuit cites Harnish at p.1110 of its opinion as supporting the propositions that portable signs are unsightly and that the legislative body charged with making aesthetic determinations must be accorded discretion in determining the best method of achieving that goal.

court interpreted Central Hudson and Metromedia to expressly require that an ordinance be narrowly tailored to meet the stated governmental interest and that it be the least restrictive means available. Id. at 1382.[6] The court in Harnish has, however, interpreted the 4th part of Central Hudson to not require the least restrictive means available and held that the courts should not speculate as to what less restrictive means may exist to accomplish the governmental interest. By holding that the court should not speculate as to whether less restrictive means exist, the Harnish court is attempting to shift the burden of proof on the required 4th part of the Central Hudson test from the county to the party asserting its

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6 The Court found that less restrictive means such as anchoring could solve the safety problem with electrical signs. Id.

First Amendment rights. Under Harnish, the government need only show that its ban reasonably advanced the stated governmental goal. Id. at 1580. Once that determination is made, the lower courts have been advised that they need go no further, thereby avoiding an assessment of whether less restrictive means of achieving the governmental interest are available. To this extent, Harnish not only conflicts with Marietta, but with this Court in the Central Hudson and Metromedia decisions, which require that the restriction must reach no further than necessary to accomplish the stated objective.

4. This is a preliminary injunction case in which the court of appeals did not limit its appellate review to the traditional standards. Rather, it gave the record "an independent examination"

because of the First Amendment question involved, citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

It is apparent that in a First Amendment case under Bose that a court of appeals has an:

> "...obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression'." Id. at 499, 104 S.Ct. at 1958.

The court of appeals, although fact finding independently of the district court's decision, does not see fit to protect the first amendment rights of petitioners. In fact, in applying this de novo review in the face of the district court's issuance

of a preliminary injunction, it assures that petitioners will be irreparably damaged prior to a final judgment in this cause. While not denying that the power to conduct such a de novo review exists (in a proper case), petitioners assert that it is inappropriate to do so in the face of the record of a hearing which has been held, of necessity, quickly with less quality than would have been possible had the case been tried on its merits after sufficient time for full discovery and preparation.

There is also a distinction between the Bose rule that a court may review the entire record of a proceeding to determine whether the particular speech in question is protected and the question of whether the court of appeals should substitute its views on the equities of the issuance of a preliminary injunction for those of the

district court. Under both Rule 52(a), Fed.R.Civ.P. (requiring the clearly erroneous test to be applied to the review of a district court's factual determinations) and United States v. Corrick, 298 U.S. 435 (1936) (requiring that the issuance of preliminary injunction be disturbed on appeal only if its issuance was erroneous as a matter of law or the result of an improvident exercise of judicial discretion), the applicable test is whether or not the district court was clearly erroneous in the exercise of its factfinding on one hand and its equitable discretion on the other.

The court of appeals has not indicated that the district court made an error of law or that the district court improvidently exercised its equitable discretion. It merely conducts a de novo review and substitutes its judgment for that of the

district court. In 1975 in the case of Meis v. Sanitas Service Corp., 511 F.2d 655, the Fifth Circuit itself discussed the issue of the prerogatives of a district court in preliminary injunction situations. It said:

> "... [t]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. 'It requires a balancing of the probabilities of ultimate success on the merits with the consequences of court intervention at a preliminary stage. The prerogative to weigh the nice distinctions involved belongs to the district court not this court.'" 511 F.2d 655 at 656.

It was an inappropriate application of the review permitted by Bose to extend it to

the review of the issuance of a preliminary injunction when the facts themselves were not fully developed and there could be no "whole record" to review.

CONCLUSION

WHEREFORE, petitioners respectfully pray that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted.

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Attorneys for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAY LINDSAY, d/b/a MAC ADVERTISING COMPANY, ET AL., Petitioners

v.

THE CITY OF SAN ANTONIO, Respondent

CERTIFICATE OF SERVICE

We hereby certify that on the 16th of November, 1987, three corrected copies of the above and foregoing Petition were served upon the City of San Antonio by placing same in the United States mail, postage prepaid, sent certified mail, return receipt requested and addressed to respondent's attorney of record Mr. Steven W. Arronge, Assistant City Attorney, City of San Antonio, 200 Main Plaza, Suite 101, San Antonio, Texas 78205.

Michael F. Archer

APPENDIX A

Jay LINDSAY, d/b/a Mac Advertising Company, et al.,
Plaintiff-Appellees

v.

The CITY OF SAN ANTONIO,
Defendant-Appellant.

No. 86-2744.

United States Court of Appeals,
Fifth Circuit.

July 17, 1987.

Before RANDALL, GARWOOD and DAVIS, Circuit Judges.

RANDALL, Circuit Judge:

Defendant, the City of San Antonio, appeals the district court's issuance of a preliminary injunction restraining the enforcement of a city ordinance the that prohibits the future display or placement of portable signs. We reverse.

I.

Plaintiffs, who are in the business of supplying, leasing, renting and selling portable signs[1] in San Antonio, Texas, brought suit to challenge the constitutionality of San Antonio City Ordinance 62652 ("the ordinance"), enacted on April 3, 1986. The ordinance amends article V of Chapter 28 of the City Code of San Antonio by adding the following section:

Sec. 28-161 Prohibition of portable signs

It shall be unlawful to intentionally place or display, or cause to be placed or displayed, any portable sign on any

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[1] A portable sign is defined in the City Code as:

> any sign designed or constructed to be easily moved from one location to another, including signs mounted upon or designed to be mounted on a trailer, wheeled carriage, or other non-motorized mobile structure. A portable sign which has its wheels removed shall still be considered a portable sign.

San Antonio, Tx., City Code ch. 28, § 28-6.

premises other than at a properly zoned storage area of one properly licensed under this chapter unless it has been registered in accordance with section 28-162.

San Antonio, Tx., City Code ch. 28, art. V, § 28-161 (Apr. 3, 1986). Section 28-162 awards noncomforming status to portable signs in place prior to September 22, 1985, if those signs are registered and maintained.[2] In the commentary accompanying the ordinance, the purposes underlying the ordinance are expressly set forth: "Prohibiting further placement of portable signs is desired because they are not consonant with aesthetic values of the community and because they present unique

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[2] On September 22, 1985, a moratorium had gone into effect prohibiting future placement of portable signs until such time as a permanent sign ordinance was passed.

safety problems."[3] Commentary to San Antonio, Tx., City Code ch. 28, art. V, §§ 28-161 & 28-162 (Apr. 3, 1986).

In their complaint, plaintiffs alleged that the ordinance violates the first and fourteenth amendments of the Constitution, and is an impairment of contract rights in violation of article I, section 10, clause 1 of the Constitution. In conjunction with their original complaint, plaintiffs

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[3] The commentary continues, in part:

> Lightweight design and easy mobility of portable signs together with frequent use of electrical components create a potential for extraordinary safety hazards. Portable signs are often placed in close proximity to public rights-of-way in order to optimally attract the attention of motorists. Such placements creates visual obstruction of oncoming pedestrian and vehicular traffic for motorists ingressing or egressing from a place of business. Portable signs also have a tendency to be blown about in strong winds. Portable signs with electrical connections and components, if improperly maintained, pose a serious public safety hazard. Therefore, use of portable signs must conform to regulations for on-premise signage as set out in Article IV, Division 1 of this chapter.

Commentary to San Antonio, Tx., City Code ch. 28, art. V, §§ 28-161 & 28-162 (Apr. 3, 1986).

filed a motion for a preliminary injunction, requesting that the district court restrain the City from enforcing the ordinance pending a final determination of the merits of the action. Pursuant to 28 U.S.C. § 636(b)(1)(B), the motion was referred to a United States Magistrate for the purpose of having the magistrate conduct an evidentiary hearing. After the hearing, the magistrate submitted to the district court proposed findings of fact and conclusions of law and a recommendation for disposition of the motion. The magistrate found that plaintiffs had satisfied the prerequisites to the issuance of a preliminary injunction and recommended that the motion for preliminary injunction be granted. The City filed objections to certain findings and conclusions. On August 13, 1986, after conducting a de novo review of the record,

the district court issued a preliminary injunction prohibiting the enforcement of the ordinance. This appeal followed.

II.

The district court issued a memorandum opinion in which it concluded that the plaintiffs were entitled to a preliminary injunction, having satisfied the four prerequisites for such relief: (1) substantial likelihood that the moving party will ultimately succeed on the merits; (2) irreparable harm if the injunction is not issued; (3) the threatened harm to the moving party will outweigh any potential injury the injunction may cause the non-movant; and (4) the injunction will not disserve the public interest. Lindsay v. City of San Antonio, No. SA-86-CA-636 (W.D.Tex. Aug. 13, 1986) (memorandum opinion) at 6 [hereinafter cited as "Memorandum Opinion"] (citing

Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074, 1079 (5th Cir.1986); Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir.1974).

The court focused its attention on the question of whether the plaintiffs were likely to prevail on the merits and found that success on the merits was likely. The court viewed the ordinance, which it found to "effectively impose [ ] an absolute ban on portable signs," [4] Memorandum Opinion at 7, as a "content neutral" ordinance, affecting commercial an non-commercial speech equally. The court then identified the proper standard for reviewing such a content-neutral regulation as that set forth in Members of the City Council v. Taxpayers for Vincent,

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[4] The court also found that alternative channels for communication exist. See Memorandum Opinion at 9. The significance of the availability of alternative channels for comunication is discussed infra at Part III.

466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984):

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 805, 104 S.Ct. at 2128-2129 (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20

L.Ed.2d 672 (1968)).[5] Finding the asserted interests behind the ordinance - aesthetics and safety - to be "important"

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[5] The court noted that the Eleventh Circuit, in Harnish v. Manatee County, 783 F.2d 1535 (11th Cir.1986), in sustaining an absolute ban of portable signs, applied the four-part test of Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), as originally set forth in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), for determining the validity of government restrictions on commercial speech:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507, 101 S.Ct. at 2892 (plurality) (citing Central Hudson, 447 U.S. at 563-66, 100 S.Ct. at 3350-3351). The district court stated that because the instant case involves both commercial and noncommercial speech, the Vincent analysis was appropriate. However, the court noted that, "[i]n any case, the second, third and fourth elements of the Central Hudson test are subsumed within Vincent. The expression at issue here was neither unlawful nor misleading, thus the first Central Hudson element is satisfied. Since both Central Hudson and Vincent require that the challenged law be no broader than necessary, it is clear that the San Antonio ordinance fails both tests."
Memorandum Opinion at 16-17.

governmental interests, in furtherance of which there was little doubt that the City may exercise its police powers, the court concluded that the crucial issues to be addressed were whether the ordinance in fact furthers the City's interest and whether the scope of the restriction on the plainitffs' expressive activity is "substantially broader than necessary to protect those interests." Considering those questions, the court determined that the problems with the ordinance were "its failure to accomplish its aesthetic purpose and its overly broad application." Memorandum Opinion at 9.

The court found that the photographs introduced into evidence by the plaintiffs "indicate that the aesthetic appearance of the City will imperceptibly change, at best, if portable signs are eliminated since portable signs appear to represent a

small fraction of the total number of sign advertisements." Id. The court found that the City had not shown that the ordinance furthers its aesthetic interests. The court went on to say that, even if the City had made that showing, the City could, according to certain testimony, control aesthetics by passing a less restrictive ordinance limiting the number of signs per commercial establishment. Further, the court noted its belief that "if the City were truly concerned with the effect of portable signs, it would not have created the grandfather clause allowing some signs to remain in place." Id. at 10.

With respect to the asserted interest in traffic safety, the court found that the testimony adduced at the evidentiary hearing substantiated the traffic concerns. However, the court also found that

the evidence established that the City's goals could be accomplished by means less severe than a total ban. Indeed, the court found that all of the City's concerns could be addressed by an ordinance imposing a regulation less drastic than a total ban. According to the Court, the record contains substantial evidence of more "narrowly tailored" means to achieve both traffic safety and aesthetics.

Therefore, based on the reasoning discussed above, the court concluded that the plaintiffs had shown a likelihood of success on the merits. The court summarized:

> While traffic safety and aesthetics are legitimate governmental concerns, the ordinance furthers the former but

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6 The court went on to note that the plaintiffs had also satisfied the three remaining prerequisites to the issuance of a preliminary injunction.

> not the latter. The evidence clearly showed that a total ban is completely unnecessary and unwarranted. The City can avoid traffic and other public safety problems related to portable signs by regulations concerning placement, construction and maintenance. Aesthetic appearance of the signs can also be regulated. The City ordinance, as now written, violates freedom of speech.

Memorandum Opinion at 17. Therefore, the court issued a preliminary injunction prohibiting the enforcement of the ordinance.

On appeal, the City raises two points of error. The first point of error appears to be an attack on the district court's finding that the City had not shown a substantial reason for prohibiting the future placement of portable signs (i.e., that the ordinance would have only an

"imperceptible" effect).[7] In this regard, the City argues that this court's decision in Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir.1983) (en banc), cert. denied, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984), dictates that we give the record de novo review because the case raises a first amendment question.

The City's second point of error is a more general attack on the district court's determination that the plaintiffs were likely to succeed on the merits because the ordinance violates the first amendment. The City argues that the City Council has stated its legitimate reasons

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[7] The City phrases its first argument on appeal several different ways. At one point in its brief, the City argues that "[t]he Courts below erred in failing to rule upon whether or not portable signs are unattractive since evidence was presented on this issue for ruling." Brief of Appellant at 5. However, in its "conclusion" to its first argument, the City states, "[t]he Court erred in not ruling that the City of San Antonio had shown a substantial reason for prohibiting the future placement of portable signs on aesthetic grounds." Id. at 7.

for the content-neutral prohibition embodied in the ordinance and has demonstrated them to the district court. The City notes that the Supreme Court has recognized that a content-neutral regulation does not, on review, warrant the same strictness of scrutiny that a content-based restriction warrants. Therefore, according to the City, since the ordinance does not abridge first amendment rights, the preliminary injunction should be dissolved.

Implicit in the City's contentions on appeal must be the argument that the district court's issuance of a preliminary injunction constitutes an abuse of that court's discretion. The grant or denial of a preliminary injunction is committed to the discretion of the district court and will be upheld absent an abuse of discretion. See, e.g., Dallas Cowboys

Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979); Di Giorgio v. Causey, 488 F.2d 527, 528-29 (5th Cir.1973). While the decision to grant or deny a preliminary injunction is left to the discretion of the trial court, the exercise of that discretion is not unbridled. See Canal Authority, 489 F.2d at 572. Rather, it must be exercised in light of the four "prerequisites" for preliminary injunctive relief recognized by this circuit:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting

the preliminary injunction will not disserve the public interest.

Id.; see also Vision Center v. Opticks, Inc., 596 F.2d 111, 114 (5th Cir.1979), cert. denied, 444 U.S. 1016, 100 S.Ct. 668, 62 L.Ed.2d 646 (1980). The four prerequisites to injunctive relief are mixed questions of law and fact. Buchanan v. United States Postal Service, 508 F.2d 259, 267 n. 24 (5th Cir.1975).

[1] It is generally accepted that a district court's findings of fact made in connection with the grant or denial of a preliminary injunction will not be set aside unless clearly erroneous. Id. Where the standard of appellate review is the narrow "clearly erroneous" standard, the role of the appellate court is obviously quite limited. In the instant case, however, our role as the reviewing court is not so limited. As this court

noted in Dunagin, in deciding whether restrictions on speech are justified, appellate courts do not rely heavily on findings of fact made by trial courts. Dunagin, 718 F.2d at 748-49 n. 8. We stated:

> the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court.

Id. at 749 n. 8.[8] This statement is

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[8] By way of example, we mentioned that, "[i]n Metromedia, despite assertions that 'the record is inadequate to show any connection between billboards and traffic safety' the judgment of the Court agreed with the 'common-sense' belief of local lawmakers and other courts that billboards do pose substantial traffic safety hazards." Dunagin, 718 F.2d at 749 n. 8 (citing Metromedia, 453 U.S. at 508-09, 101 S.Ct. at 2893 (plurality)).

In Dunagin, we also commented that "the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role." 718 F.2d at 748 n. 8.

in line with the Supreme Court's notation in a libel case, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) that, "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record.'" Id. at 499, 104 S.Ct. at 1958 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964)).

The view expressed in Dunagin seems consistent also with the Supreme Court's most recent statement regarding the scope of appellate review in first amendment cases. In Rankin v. McPherson, ____ U.S. ____, 107 S.Ct. ____, ____ L.Ed.2d ____ (1987), the Court considered the issue of whether a clerical employee in a county constable's office was properly discharged

for engaging in speech, specifically, for remarking, after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him." See id. 107 S.Ct. at ____.

The district court in McPherson had ruled that the plaintiff's remark was not protected speech. On appeal, this court reversed. McPherson v. Rankin, 786 F.2d 1233 (5th Cir.1986), aff'd, 107 S.Ct. ____, (1987). We held that the plaintiff's remark had addressed a matter of public concern, requiring that society's interest in the plaintiff's freedom of speech be weighed against her employer's interest in maintaining efficiency and discipline in the workplace. Performing that balancing, we concluded that the government's interest did not outweigh the first amendment interest in protecting plaintiff's speech. In its opinion

affirming the decision reached by this court, a majority of the Supreme Court wrote that "any factual findings subsumed in the 'public concern' determination are subject to constitutional fact review." McPherson, 107 S.Ct. at ____. In conjunction with that proposition, the Court cited this court's opinion in the case, 786 F.2d at 1237,[9] as well as

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[9] In our opinion, authored by Judge Higginbotham, in the context of discussing "[t]he precise fit of the clearly erroneous standard of review and our duty to make 'an independent constitutional judgment on the facts of the case,'" 786 F.2d at 1237 (quoting Connick v. Myers, 461 U.S. 138, 150 n. 10,103 S.Ct. 1684, 1692 n. 10, 75 L.Ed.2d 708 (1983)), we noted that:

> [W]hen what was said and its context are undisputed, the constitutional "status" of the speech is to be independently examined by an appellate court. When what was said, but not its context, is disputed, the choice belongs to the trier of fact; on appeal, the determination of what was said is subject to review by the clearly erroneous standard, and the constitutional "status" of the statement is given independent review. Yet, when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain: factual conclusions about the speaker's intent, audience effect, and other elements of context are not so easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns."

McPherson, 786 F.2d at 1237.

the Supreme Court's opinion in Bose.

III.

[2] It is well-established that, as the district court found, the state may legitimately exercise its police powers to advance the substantial governmental goals of aesthetics and traffic safety, see, e.g., Vincent, 466 U.S. at 805, 104 S.Ct. at 2129; Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-2893, 69 L.Ed.2d 800 (1981) (plurality), and thus, it is clearly within the constitutional power of the City to attempt to improve the appearance of San Antonio and to improve traffic safety. It is also undisputed that those interests are basically unrelated to the suppression of ideas. Thus, the critical inquiries are, as the district court stated, whether the ordinance does further the City's interests and whether the

restriction on speech is greater than is essential to the furtherance of those interests.

We believe that the district court's critical finding that the ordinance would not further the City's aesthetic interest cannot stand. As an initial matter, we note our concern about the approach taken by the district court in making its determination that the ordinance does not "further" the governmental interest in aesthetics. The district court found that photographs introduced into evidence by the plaintiffs "indicate that the aesthetic appearance of the City will imperceptibly change, at best, if portable signs are eliminated since portable signs appear to represent a small fraction of the total number of sign advertisements." Memorandum Opinion at 9 (emphasis added). Such a finding by a trial court raises

several concerns. First, it is unclear what factors should, and do, inform a court's decision as to whether an effect on a governmental interest is "imperceptible." The limits on such a determination seem boundless. In a related vein, when a trial court makes such a finding, the potential for the court to substitute its own judgment about aesthetics for that of the body charged with making aesthetic determinations is great. Left open is the possibility that the trial court will decide that nothing short of full achievement - as opposed to "furtherance" - of a governmental purpose is sufficient to justify a particular restriction on speech. Indeed, in the instant case, notwithstanding protestations by the court to the

contrary,[10] the court's general description of the problem with the ordinance - "its failure to accomplish its aesthetic purpose" - suggests that the district court took such an approach to the question raised under Vincent of whether the regulation "furthers an important or substantial governmental interest." Vincent, 466 U.S. at 805, 104 S.Ct. at 2128 (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968)). It seems that the district court may have been holding the City to a standard requiring it to cure all visual blight, or none at all.

[3] Such an approach seems to be at

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10 The court noted that, "Plaintiffs introduced photographs indicating that portable signs are no more of a traffic hazard and no more aesthetically displeasing that [sic] are many pole and permanent signs. Even if this is true the City is not precluded from curing only some of its visual blight and traffic problems." Memorandum Opinion at 9.

odds with the principle that the district court itself recognized - that the elimination of all visual blight is not the constitutional prerequisite to an ordinance regulating a type of signage. The case law makes clear that a city is not precluded from curing only some of its visual blight, see, e.g., Vincent, 466 U.S. at 811, 104 S.Ct. at 2132 ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance."), or from pursuing the elimination of visual blight in a piecemeal fashion. See, e.g., Metromedia, 453 U.S. at 531-32, 101 S.Ct. at 2904-2905 (Brennan, J., concurring in the judgment).

While we are troubled by the implications of the district court's approach, we recognize that the Supreme Court's opinion in Vincent suggests that district courts

can, in fact, determine that, because of the large number of signs in a particular area, and ordinance banning a type of signage will have only an inconsequential effect, and thus, that the ordinance does not "further" the interest in aesthetics. In the course of upholding an ordinance that prohibited the posting of signs on public property, the Court noted:

> [T]here is no finding that in any area where appellees seek to place signs, there are already so many signs posted on adjacent private property that the elimination of appellees' signs would have an inconsequential effect on the esthetic values with which the City is concerned. There is simply no predicate in the findings of the District Court for the conclusion that the prohibition against the

> posting of appellees' signs fails to advance the City's esthetic interest.

Vincent, 466 U.S. at 811-12, 104 S.Ct. at 2132. Therefore, it seems that the Court is implicitly recognizing that such a finding of "inconsequential effect" could support the conclusion that the ordinance does not further the governmental interest under the Vincent test.

[4] In the instant case, the district court undoubtedly focused in on the above-quoted language from Vincent since its finding that the ordinance would imperceptibly change the aesthetic appearance of the City closely tracks the words of Vincent. While we assume, on the basis of Vincent, that the district court can make such a finding and that a finding of "inconsequential effect" can support the conclusion that an ordinance does not

further the aesthetic interest, we also believe that this court, on review, is not bound by that finding.[11] See McPherson, 107 S.Ct. at ___; Bose, 466 U.S. at 499, 104 S.Ct. at 1958-59; Dunagin, 718 F.2d at 748-49 n. 8.

[5] We have carefully reviewed the record in this case. The record consists of more than 25 photographs submitted by the plaintiffs, approximately 15 photographs submitted by the City, copies of various San Antonio city ordinances regulating signage, and a transcript of the testimony adduced at the evidentiary hearing. Our review of the evidence would lead us to conclude, contrary to the result reached by the district court, that the record demonstrates that the ordinance

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11 Under the reasoning employed in this court's decision in McPherson, see supra at note 8, we believe that this finding is one for which independent review is appropriate.

does, in fact, further the City's aesthetic interest. However, even assuming that our view of the record is not persuasive, the best that can be said of the record evidence is that it is inconclusive. The photographs submitted by the City are simply pictures of portable signs, seemingly introduced into evidence to depict what we take to be relatively obvious--that the portable signs are unsightly. Cf. Harnish v. Manatee County, 783 F.2d 1535, 1539 n. 4 (11th Cir. 1986) (Eleventh Circuit commented that "[a]n examination of the forty-nine photographs of portable and changeable copy signs appearing in the record confirms an unsightly visual cluster."). The photographs submitted by the plaintiffs, showing the many varieties of signage that populate San Antonio, were apparently collected and submitted for the purpose of

establishing that San Antonio has a great many non-portable signs which serve to create visual blight. The testimony is similarly inconclusive, with various witnesses testifying that portable signs are unaesthetic (some saying that portable signs are less aesthetically pleasing than other types of signs) and with testimony from some of those witnesses that restrictions short of a total ban would serve to make portable signs less unsightly--i.e., no more unsightly than other signs.

When the evidence is weighed taking into account the need to accord deference to the judgment of the body charged with the responsibility of making determinations about aesthetics, cf. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299, 104 S.Ct. 3065, 3072, 82 L.Ed.2d 221 (1984); Metromedia, 453 U.S. at 509, 101 S.Ct. at 2893 (plurality); Harnish, 738

F.2d at 1539; Dunagin, 718 F.2d at 748 n. 8, and with care not to substitute the judgment of a court for the judgment of that body, the balance tips in favor of the finding that the ordinance does further the City's aesthetic interest.

We turn now to the district court's finding that there is substantial evidence that more narrowly tailored means exist to achieve both traffic safety and aesthetics. For purposes of this opinion, we can assume, arguendo, that the traffic safety interest could be furthered by means of a more narrowly tailored ordinance. Cf. Harnish, 738 F.2d at 1540 ("Since we hold that on this record the prohibition of portable signs to eliminate the aesthetic blight passed muster under the First Amendment, we have no occasion to address the holding of the district court that less restrictive means would accomplish

the safety objective."). Therefore, we consider only the court's finding that more narrowly tailored means exist to achieve the City's aesthetic interest.

[6] For guidance in approaching this question, we look to the reasoning employed by the Supreme Court in Vincent in making its determination of whether the scope of the restriction on the posting of signs on public property was "substantially broader than necessary to protect the City's interest in eliminating visual clutter." Vincent, 466 U.S. at 808, 104 S.Ct. at 2130. The Court found that, by banning the signs, "the City did no more than eliminate the exact source of the evil it sought to remedy." Id. at 808, 104 S.Ct. at 2130 (footnote omitted).[12]

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12 The Court noted that, in Metromedia, a majority of the Court had concluded that a prohibition on billboards was narrowly tailored to the visual evil that the City of San Diego sought to correct. Vincent, 466 U.S. at 808 n. 27, 104 S.Ct. at 2130 n. 27.

In justifying its conclusion with regard to the case before it, the Vincent Court noted that "[t]he plurality wrote in Metromedia: 'It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm."' . . . The same is true of posted signs." Id. at 808, 104 S.Ct. at 2131.[13] We believe that this reasoning applies with equal force to the instant case. The ban on portable signs is not "substantially broader than necessary" to protect the City's aesthetic interest.

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13 The Court did note that "[t]he District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight." Vincent, 466 U.S. at 808, 104 S.Ct. at 2130. However, on the basis of the quoted reference to Metromedia, it seems that the Court was willing to decide, for itself, that posted signs were "esthetically harmful." Therefore, the district court's finding of that fact was not dispositive.

Finally, we recognize that "[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places . . . a restriction on expressive activity may be invalid if the remaining modes of communciation are inadequate." Vincent, 466 U.S. at 812, 104 S.Ct. at 2132 (citations omitted). In the instant case, there are ample methods of communication that are available as alternatives to portable signs.[14] Nothwithstanding plaintiffs' suggestions that portable signs have special qualities (low cost, capability of having their messages changed frequently), nothing in the find-

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14 As the Court in Vincent noted, "[a]lthough the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry . . . this solicitude has practical boundaries." Vincent, 466 U.S. at 812-13 n. 30, 104 S.Ct. at 2133 n. 30 (citations omitted).

ings of the district court or in the record indicates that portable signs are a uniquely valuable or important mode of communication or that plaintiffs' ability to effectively communicate is threatened by ever-increasing restrictions on speech. Cf. id. Indeed, addressing the question of whether alternative channels for communication exist, the district court found that "[t]he evidence establishes that plaintiffs could engage in other types of sign businesses and that other modes of advertising are available to persons now using portable signs." Memorandum Opinion at 9. [15]

[8] Therefore, for the reasons outlined above, we believe that the district court abused its discretion in granting the

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15 We note that the City has pointed but that "San Antonio has special exemptions to address political and other non-commercial speech within its sign ordinances." Brief of Appellant at 11.

plaintiffs' motion for a preliminary injunction since we disagree with the court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits.

IV.

On the basis of the foregoing, the district court's order issuing a preliminary injunction is REVERSED.

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-86-CA-636

JAY LINDSAY, dba MAC ADVERTISING COMPANY, MIKE SWIERCINSKY dba TRAIL-A-WAY SIGNS and TOM LOCKRIDGE dba BETTER SIGN RENTALS, Plaintiffs

v.

THE CITY OF SAN ANTONIO, Defendant

[Filed August 13, 1986]

PRELIMINARY INJUNCTION

In accordance with the Memorandum Opinion being entered contemporaneously herewith;

It is ORDERED that defendant City of San Antonio, its officers, employees, agents and servants, and all persons acting in concert or participation with it are RESTRAINED from enforcing, executing,

administering or, in any manner, giving effect to the portable sign ordinance enacted on April 3, 1986, cited as section 28-161 of article V of chapter 28 of the Code of the City of San Antonio. Within 15 days, plaintiffs shall provide security in the amount of $5,000.00 to pay any costs or damages suffered by defendant in the event it is found defendant was wrongfully restrained.

SIGNED this 13th day of August, 1986.

/s/ H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-86-CA-636

JAY LINDSAY, dba MAC ADVERTISING COMPANY, MIKE SWIERCINSKY dba TRAIL-A-WAY SIGNS and TOM LOCKRIDGE dba BETTER SIGN RENTALS, Plaintiffs

v.

THE CITY OF SAN ANTONIO, Defendant

[Filed August 13, 1986]

MEMORANDUM OPINION

Plaintiffs, who are in the business of supplying, leasing, renting and selling portable signs in the City of San Antonio, Texas, initiated this lawsuit to challenge the constitutionality of a city ordinance prohibiting further placement or display of portable signs. They allege the ordin-

ance violates their right to freedom of speech under the First Amendment, the due process and equal protection clauses of the Fourteenth Amendment, and article I, section 10, clause 1 of the United States Constitution, proscribing impairment of contracts by the States. In conjunction with the original complaint, plaintiffs filed a motion for preliminary injunction requesting that the Court restrain the City from enforcing the ordinance pending a final determination of this action. Pursuant to Title 28 U.S.C. Section 636(b)(1) (B), the motion was referred to a United States Magistrate to conduct an evidentiary hearing and to submit to the Court proposed findings of fact and a recommendation for disposition. The hearing was held and the Magistrate found that plaintiffs had satisfied the pre-requisites to the issuance of a pre-

liminary injunction and recommended that the motion be granted. The City has filed objections to certain findings and conclusions. This Court has conducted a de novo review of the report by reading the pleadings and the transcript of the evidentiary hearing, and by examining the exhibits.

In a case challenging the constitutionality of a zoning ordinance, as in most cases, a preliminary injunction may be issued only after the moving party has established four prerequisites: first, there is a substantial likelihood it will ultimately succeed on the merits; second, the moving party will suffer irreparable harm if the injunction is not issued: third, the threatened harm to the moving party will outweigh any potential injury the injunction may cause the opposing party; and finally, the injunction if

issued, will not be adverse to public interest. Star Satellite, Inc., v. City of Biloxi, 779 F.2d 1074, 1079 (5th Cir. 1986). Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1979). Whether plaintiffs are likely to prevail on the merits shall be addressed first.

On April 3, 1986, the San Antonio City Council amended Article V of Chapter 28 of the City Code by adding the following section:

> Sec. 28-161 Prohibition of portable signs
>
> It shall be unlawful to intentionally place or display, or cause to be placed or displayed, any portable sign on any premises other than at a properly zoned storage area of one properly licensed under this chapter unless it has been registered in accordance with section 28-162.

Section 28-162 awards nonconforming status to portable signs in place prior to September 22, 1985, if they are registered and maintained. On that date a moratorium went into effect prohibiting future placement of portable signs until such time as a permanent sign ordinance was passed. Although the ordinance has a grandfather clause, most signs in place on September 22, 1985 have been returned. The clause has little benefit for plaintiffs, resulting in the conclusion that the ordinance, with its prohibition of future placement, effectively imposes an absolute ban on portable signs.

Plaintiffs contend that the portable sign ordinance violates the First Amendment by unduly prohibiting commercial speech and the dissemination of lawful information. The general principle that has emerged from "freedom of speech" cases

is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, ____, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). As in Vincent, the general rule has no application here because the challenged ordinance is content neutral. It affects commercial and noncommercial speech equally and was neither designed nor applied to suppress certain ideas that the City finds distasteful. The medium, not the message, is being regulated. Citing United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), the Vincent Court set forth the appropriate framework for reviewing a viewpoint neutral regulation:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Vincent, 104 S.Ct. at 2129.

The City seeks to justify its prohibition of portable signs as a valid regulation of traffic safety and preservation of aesthetic values. There is little doubt that the City may legitimately exercise its police powers to further these important governmental interests. Metromedia, Inc. v. City of San Diego, 453

U.S. 490, 507-08, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981). Vincent, 104 S.Ct.at 2129-30. And as noted above, the ordinance is content neutral and, thus, unrelated to the suppression of ideas. The crucial issues to be addressed are whether the ordinance, in fact, furthers the City's interests in traffic safety and aesthetics, and whether the scope of the restriction on plaintiffs' expressive activity is substantially broader than necessary to protect those interests. The incidental restriction on expression which results from the City's attempt to advance those interests is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest, and if it leaves open ample alternative channels for communication of the information. Clark v. Community for Creative

Non-Violence, 468 U.S. 288, ____, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). Vincent, 104 S.Ct. at 2130. See, City of Renton v. Playtime Theatres, Inc., ___ U.S. ___, 106 S.Ct. 925, 928 (1986). The latter requirement has been met. The evidence establishes that plaintiffs could engage in other types of sign businesses and that other modes of advertising are available to persons now using portable signs. The problem with this ordinance arises with respect to its failure to accomplish its aesthetic purpose and its overly broad application.

Plaintiffs introduced photographs indicating that portable signs are no more of a traffic hazard and no more aesthetically displeasing that are many pole and permanent signs. Even if this is true the City is not precluded from curing only some of its visual blight and traffic

problems. Metromedia, at 510-11, 101 S.Ct. at 2894. However, the photographs do indicate that the aesthetic appearance of the City will imperceptibly change, at best, if portable signs are eliminated since portable signs appear to represent a small fraction of the total number of sign advertisements. John R. Mosty, the executive director of the San Antonio Convention Visitor's Bureau, testified that the tourism industry is of major importance for the City of San Antonio, and that the City's natural beauty attracts visitors. Although it was his opinion that portable signs are unattractive, there have been no inquiries of visitors concerning their views of portable signs. He conceded that the tourism industry is growing every day despite the presence of such signs. The City has, thus, not shown that the ordin-

ance furthers its aesthetic interests. Even if it had, the City could, according to Christopher Powers, a planner with the Comprehensive Planning Section of the City Planning Department, control aesthetics by passing a less restrictive ordinance limiting the number of signs per commercial establishment. It seems that if the City were truly concerned with the effect of portable signs, it would not have created the grandfather clause allowing some signs to remain in place.

The City Council's commentary to the portable sign ordinance reads as follows:

> Commentary: Prohibiting further placement of portable signs is desired because they are not consonant with aesthetic values of the community and because they present unique safety problems.

Lightweight design and easy mobility of portable signs together with frequent use of electrical components create a potential for extraordinary safety hazards. Portable signs are often placed in close proximity to public rights-of-way in order to optimally attract the attention of motorists. Such placement creates visual obstruction of oncoming pedestrian and vehicular traffic for motorists ingressing or egressing from a place of business. Portable signs also have a tendency to be blown about in strong winds. Portable signs with electrical connections and components, if improperly maintained, pose a serious public safety hazard. Therefore, use of portable signs must conform to regulations for on-premise signage [sic] as set out

in Article VI, Division 1 of thisr chapter.

Registration and annual inspection of portable signs are necessary measures to identify especially hazardous conditions and promote to the extent possible their proper operation and maintenance and to preserve the health, safety and welfare of citizens of and visitors to the City of San Antonio.

Testimony at the evidentiary hearing substantiated the traffic concerns. Many portable signs are improperly constructed and maintained, are not anchored, and are improperly placed on public rights-of-way and in such a manner as to obstruct a driver's view. At least one accident has been attributed to a portable sign which obstructed a driver's sight. However, the

evidence also established that the City's goals could be accomplished by means less severe than a total ban on further placements. Jay Lindsay, one of the plaintiffs, who is in the business of leasing portable signs, testified to several suggestions and recommendations he would make to accomplish the City's goals. He would establish a minimum distance between the signs, and setback requirements to place the signs, on private property only, a sufficient distance from the roadway to prevent a potential traffic hazard near intersections and driveways. The signs should be maintained for their appearance and be staked to prevent being blown about. He suggests heavy restrictions or total elimination of electric signs. At a minimum, there would be no red, blue or white flashing lights which could be confused with an emergency vehicle, and

there would be no rotating beacons, and a limit on bulb wattage.

Gene Camargo, director of Department of Building Inspections for the City, testified that he has no problem with the design of portable signs if the construction materials are of a certain quality. He admitted that the City could conduct inspections to assure proper materials are used. While stating that vision obstruction would occur with portable signs (4 feet from the ground) and not with pole signs (8 1/2 feet from the ground), he conceded that the height difference would not matter if a regulation required that the signs be placed a sufficient distance from the roadway. His only objection to a placement standard for portable signs concerned the creation of two standards for on-premise signs. Yet, in a memorandum to the City Council on December 11,

1985, he recommended that portable signs conform to on-premise sign regulations. The same memorandum suggested specific restrictions regarding construction, anchoring, setback and height requirements, inspections and maintenance to comply with the City electrical code. At the hearing he admitted that the City's safety concerns would be promoted by regulation of anchoring and the electrical aspect of the signs.

Every problem associated by the City with portable signs is correctible by means less restrictive than a total ban. Ordinances restricting time, place and manner of expression are viewed differently from those eliminating an activity all together. In Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the Supreme Court

invalidated, as unreasonably broad, an ordinance banning all live entertainment:

> "...this ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it is not clear that a more selective approach would fail to address those unique problems if any there are. The Borough has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression." Id. at 74, 101 S.Ct. at 2186.

In In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Supreme Court held unconstitutional a Missouri Supreme Court rule absolutely prohibiting an attorney from mailing announcement cards. And in Virginia State Board of

Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the Supreme Court held that a statutory ban on the advertising of prescription drug prices violated the First and Fourteenth Amendments. See also, City of Renton, 106 S.Ct. at 931 (noting that Renton's ordinance was "narrowly tailored" thus avoiding the flaw that proved fatal in Schad). Our Court of Appeals has also more closely scrutinized a ban of expressive activity as opposed to a mere restriction or limitation. In Lamar Outdoor Advertising v. Mississippi State Tax Commission, 701 F.2d 314 (5th Cir. 1983), the Fifth Circuit found unconstitutional Mississippi's wholesale exclusion of liquor advertising. The more stringent standard of Schad was applied in Basiardanes v. City of Galveston, 682 F.2d

1203 (5th Cir. 1982) to invalidate a city ordinance which effectively banned theaters which exhibit adult films. The Court of Appeals also found that Galveston's absolute prohibition of adult theater street advertisements was too broad. Id. at 1219. See also, Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074 (5th Cir. 1986) (upholding Mississippi law regulating hours of adult bookstores, and distinguishing such regulation from the total exclusion of speech in Schad).

The City of San Antonio can regulate portable signs and serve its legitimate interests short of total prohibition. The City has several sign ordinances limiting, but not excluding, billboards and other commercial signs. In fact, the prior ordinance governing portable signs set licensing and inspection requirements, and

established electrical standards. Portable signs are now the only part of the San Antonio sign industry faced with a total ban. In view of the record, the Court is compelled to conclude the City has not narrowly tailored the portable sign ordinance to further its interest in traffic safety.

Prior authorities reviewing other portable sign ordinances have reached similar results. In Dills v. City of Marietta, Georgia, 674 F.2d 1377 (11th Cir. 1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983), plaintiffs challenged regulations restricting the time period when portable signs could be used. The City sought to justify the ordinances as furtherance of its interests in traffic safety and aesthetics. Based on the evidence, the district court found no proof that

Marietta officials considered portable signs aesthetically displeasing. The Court of Appeals, in affirming the district court's decision to restrain enforcement of the provisions, found that the ordinance also failed to further the claimed interest in traffic safety. The Eleventh Circuit noted that concerns that the signs would blow over could be satisfied by less restrictive measures, such as anchoring. In Dills v. Cobb County, Georgia, 593 F.Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985), the district court, applying Vincent, held unconstitutional a county sign ordinance establishing setback requirements for portable signs. The evidence in that case also failed to establish that the ordinance furthered the County's interests in traffic safety and aesthetics. The district court found that

the ordinance effectively amounted to an overall ban on the use of portable signs and was not narrowly drawn to serve the County's interests. A total ban was also invalidated on First Amendment grounds in Signs, Inc. of Florida v. Orange County, Florida, 592 F.Supp. 693 (M.D. Fla. 1983). The evidence in that case did not establish that the County's interests in traffic safety and aesthetics were furthered by the resolution. It was also apparent that less restrictive means of furthering these interests were available. The same district court in All American Sign Rentals, Inc. v. City of Orlando, 592 F.Supp. 85 (M.D. Fla. 1983) found a city ordinance establishing time and setback requirements for portable signs unconstitutional because it failed to effect traffic safety and aesthetics.

The two cases which have upheld portable sign ordinances are distinguishable. In Sign Supplies of Texas v. McCoun, 517 F.Supp. 778 (S.D. Tex. 1980), a Houston ordinance regulating the size, height, location, and construction of portable signs was found to be constitutional. That case was decided before Metromedia and Vincent and did not, therefore, apply their analyses. Additionally, the ordinance regulated but did not totally ban portable signs, which is the major flaw with San Antonio's ordinance. The Eleventh Circuit in Harnish v. Manatee County, Florida, 783 F.2d 1535 (11th Cir. 1986) did sustain an absolute ban of portable signs. The Court of Appeals did not address the safety issue because it upheld the ordinance as an appropriate means of eliminating aesthetic blight. It also noted that the record was bare of

evidence from which it might be inferred that less restrictive means existed to accomplish the aesthetic goal. As noted above, the record in the case at bar fails to establish that San Antonio's ordinance will further this objective. The record also contains substantial evidence of more "narrowly tailored" means to achieve traffic safety and aesthetics.

The Harnish Court, in upholding the ban, and the Dills I Court and All American Court, in striking the regulation, applied the four part test in Metromedia, as adopted in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), for determining the validity of government restrictions on commercial speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not

misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. Id. at 563-566, 100 S.Ct. at 2350-2351. This Court believes that in a case such as the one at bar where both commercial and noncommercial speech are concerned, Vincent, presents the proper analysis to be used. See, Signs, Inc. of Florida, at 695, n.6. In any case, the second, third and fourth elements of the Central Hudson test are subsumed within Vincent. The expression at issue here was neither unlawful nor misleading, thus the first Central Hudson element is satisfied. Since both Central Hudson and Vincent require that the challenged law be no broader than necessary, it is clear that

the San Antonio ordinance fails both tests.

The Court concludes that plaintiffs have shown a likelihood of success on the merits concerning the invalidity of the portable sign ordinance under the First Amendment. While traffic safety and aesthetics are legitimate governmental concerns, the ordinance furthers the former but not the latter. The evidence clearly showed that a total ban is completely unnecessary and unwarranted. The City can avoid traffic and other public safety problems related to portable signs by regulations concerning placement, construction and maintenance. Aesthetic appearance of the signs can also be regulated. The City ordinance, as now written, violates freedom of speech. The remaining legal objections need not be addressed at this time.

Plaintiffs have, as well, satisfied the remaining prerequisites to the issuance of a preliminary injunction. Jay Lindsay testified that most of his signs are in San Antonio and that he would be put out of business if the ordinance was enforced. He would lose his $25,000.00 investment and an income of between $2,000.00 and $3,000.00 per month. Thomas Lockridge, also a renter of portable signs, testified that most of his signs are in San Antonio, and that enforcement of the ban would force him out of business as well. Such effects certainly constitute irreparable injury. Other than the continued presence of portable signs, which have existed in San Antonio for several years, the City could suffer no injury if the injunction is granted. The City is certainly free to, at any time, enact Lindsay's proposed restrictions to remove any adverse impact

portable signs may have on traffic safety and aesthetics. Issuance of the injunction will not disserve the public interest. Only one person could attribute his accident to the existence of a portable sign. The preliminary injunction shall issue.

SIGNED this 13th day of August, 1986.

/s/ H.F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE COURT OF APPEALS
OF THE UNITED STATES
FOR THE FIFTH CIRCUIT

No. 86-2744

D.C. Docket No. SA-86-CA-636

JAY LINDSAY, dba MAC ADVERTISING COMPANY, ET AL., Plaintiffs-Appellees,

v.

THE CITY OF SAN ANTONIO, Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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[Filed July 17, 1987]

Before RANDALL, GARWOOD and DAVIS, Circuit Judges.

J U D G M E N T

This cause came to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

July 17, 1987

ISSUED AS MANDATE:

APPENDIX E

IN THE COURT OF APPEALS
OF THE UNITED STATES
FOR THE FIFTH CIRCUIT

No. 86-2744

JAY LINDSAY, dba MAC ADVERTISING COMPANY,
ET AL., Plaintiffs-Appellees,

v.

THE CITY OF SAN ANTONIO,
Defendant-Appellant

Appeal from the United States District
Court for the Western District of Texas

[Filed September 4, 1987]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 7-17-87, 5 Cir., 198___,
___F.2d___)

(September 4, 1987)

Before RANDALL, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service

not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen Randall
United States Circuit Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
GILBERT F. GANUCHEAU
CLERK
TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

September 23, 1987

Mr. Michael F. Archer
Attorney at Law
8023 Vantage, Suite 800
San Antonio, TX 78230-4752

No. 86-2744 - LINDSAY vs. THE CITY OF SAN ANTONIO

USDC # SA-86-CA-636

MANDATE STAYED TO AND INCLUDING OCTOBER 23, 1987

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court

that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said

documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ By Margie Thompson
Deputy Clerk

Enclosures

cc: Mr. Steven W. Arronge

APPENDIX G

DON'S PORTA SIGNS, INC. v.
CITY OF CLEARWATER

DON'S PORTA SIGNS, INC., West Coast Sign Co., Ltd., Signs by Design of Florida, Inc., et al., Plaintiffs-Appellees,

v.

CITY OF CLEARWATER,
Defendant-Appellant.

No. 86-3159.

United States Court of Appeals,
Eleventh Circuit.

Oct. 13, 1987.

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT*, Senior Circuit Judge.

SWYGERT, Senior Circuit Judge:

The City of Clearwater appeals from a judgment of the district court declaring the City's regulation of portable

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* Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

signs to be in violation of the first amendment and granting injunctive relief. We reverse.

I.

The City of Clearwater is a resort community with several miles of beaches located on the west coast of Florida. Since the City relies heavily on tourism, preserving a visually attractive environment is of great importance to the community. On August 29, 1985, the City adopted a comprehensive Land Development Code which, among other things, regulates the location, placement, erection, alteration, extension, installation and continuation of all signs. See City of Clearwater, Fla., Land Development Code ch. 134 (1985). Section 134.004 of the Code provides that the sign regulations are designed to:

3. Lessen hazardous situations, con-

fusion and visual clutter caused by proliferation, improper placement, illumination, animation and excessive height, area and bulk of signs which compete for the attention of pedestrian and vehicular traffic.

4. Enhance the attractiveness and economic well-being of the City of Clearwater as a place to live, vacation, and conduct business.

Id. §134.004(a)(3), (4).

The portion of the sign regulations pertaining to portable signs[1] states:

Portable Signs:

a. Not more than one (1) portable sign shall be placed on any property.

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[1] A portable sign is defined as follows:
A sign which is: (a) neither permanently anchored to the ground nor permanently affixed to a building or structure, or (b) mounted on a trailer chasis.
City of Clearwater, Fla., Land Development Code § 137.005.

b. The sign and sign structure shall be positioned at least five (5) feet from all property lines.

c. The sign and sign structure shall not exceed six (6) feet in height in any residential zoning district or in the Limited Office District, and shall not exceed eight (8) feet in height in any other district.

d. Any portable sign with a height in excess of three (3) feet which is strategically placed with respect to a vehicular accessway shall require the approval of the Traffic Engineer in order to ensure that sufficient cross-visibility is afforded.

e. Portable signs shall be used only as temporary signs.

Id. §134.012(A)(7). The plaintiffs-appellees, small businesses engaged in the leasing and renting of portable signs, and

merchants who use portable signs to advertise, claim that the portable sign regulation amounts to a total ban.[2] The City does not dispute this characterization of the regulation. Shortly after the Land Development Code became effective, the plaintiffs challenged the section of the ordinance pertaining to portable signs on various constitutional grounds. On February 27, 1986, the district court granted the plaintiffs a permanent injunction and declared the portable sign regulation unconstitutional under the first amendment.[3]

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[2] According to the complaint, the regulations effectively prohibit portable signs in three ways: (1) virtually none of the portable signs used in the City fall into the temporary use category; (2) most of the portable signs used in the City are larger than the specified size limitations; and (3) the sign regulations generally limit all properties to one permitted sign, and on most of the properties using portable signs the maximum number of signs have been erected as permanent signs.

[3] The court also found the ordinance to be in violation of the equal protection clause, apparently because of the ordiance's disparate treatment of portable and permanent signs.

[1] In evaluating the plaintiffs' first amendment claims, the court applied the four-part commercial speech test set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) [4] Under the Central Hudson test, (1) only commercial speech which concerns a lawful activity and is not misleading is protected under the first amendment. A restriction on protected commercial speech is valid if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. 447 U.S. at 566. The parties did not dispute that the speech at issue satisfied the

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4 We note that the sign regulations contain exemptions for political and other noncommercial speech. See City of Clearwater, Fla., Land Development Code § 134.008.

first prong of the test, and the court readily conceded the substantiality of the City's asserted interest in aesthetics.[5] However, the court concluded that the regulation did not directly advance the City's interest in aesthetics because the City had failed to establish that portable signs are any more unattractive than permanent signs, buildings, utility poles and wires, parking lots, or traffic congestion.[6] In addition, the court held that the City had not demonstrated that less intrusive restrictions would not serve the City's interests as well. This appeal

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5 The City also attempted to justify the ordinance on the basis of traffic safety, but does not do so on appeal.

6 As the court pointed out, permanent signs are given an extended period of time to comply with the sign regulations. See City of Clearwater, Fla., Land Development Code § 134.015.

followed.[7]

II.

On appeal, the City argues that the present case is controlled by this court's recent decision in Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986). We agree. In Harnish, this court concluded, based upon the record before it, that a similar ban on portable signs satisfied the Central Hudson test. In so holding, the Harnish court emphasized that the governmental entity charged with the responsibility of making determinations about aesthetics must be given discretion in determining both the best method of

---

[7] On the day that it granted the permanent injunction, the district court found the City in contempt for violating the court's earlier preliminary injunction. The City also appeals this contempt order. The imposition of sanctions, however, is a prerequisite for appellate review of a contempt order, see SEC v. Naftalin, 460 F.2d 471, 475 (8th Cir. 1972), and there is nothing in the record indicating that the district court ever imposed sanctions. The appeal of the contempt order therefore is dismissed.

achieving that goal and the degree of protection necessary. 783 F.2d at 1539.

[2,3] In the present case, the City submitted evidence that portable signs are particularly unattractive and that their removal would enhance the visual quality of the community.[8] The district court nevertheless believed that the elimination of portable signs would not have a significant impact on aesthetics, and thus would not "directly advance" the governmental interest, because permanent signs and other visually unattractive structures would not also be immediately eliminated. As the Supreme Court observed in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12, 101 S.Ct. 2882, 2894-95, 69 L.Ed.2d 800 (1981) (plurality),

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8 See, e.g., Deposition of Michael Maxwell at 53-54, 66-68; Deposition of John Richter at 23-41. As in Harnish, there are also photographs of portable signs in the record "confirm[ing] an unsightly visual cluster." 783 F.2d at 1539 n. 4.

however, a partial solution to a city's aesthetic problems may still directly advance the city's goals. The Constitution does not require the City to choose between curing all of its aesthetic problems or curing none at all. See also Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 810-11, 104 S.Ct. 2118, 2131-32, 80 L.Ed.2d 772 (1984) (upholding a ban on the posting of signs on public property); Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528, 1531 (11th Cir. 1985) (upholding an ordinance prohibiting the operation of advertising vehicles and watercraft); Lindsay v. City of San Antonio, 821 F.2d 1103, 1110 (5th Cir. 1987) (upholding a ban on portable signs). Moreover, the regulation of portable signs is but one aspect of the City's comprehensive effort to improve the

City's appearance and should not be viewed in isolation. In light of these principles, as well as the deference to the City dictated by Harnish, we conclude that the record sufficiently supports the City's judgment that the regulation of portable signs will help to eliminate visual clutter and thereby further the City's interest in improving the visual character of the City.[9]

Harnish also compels us to conclude that the regulation is no more extensive than necessary to accomplish the City's goals.

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[9] In cases involving first amendment claims, an appellate court must make an independent examination of the whole record. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed. 2d 502 (1984). We therefore agree with the Fifth Circuit's conclusion in Lindsay, 821 F.2d at 1107, that an appellate court is not bound by the "clearly erroneous" standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary. See also Dunagin v. City of Oxford, 718 F.2d 738, 748 n. 8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984).

In Harnish, this court held that, in the absence of evidence in the record indicating that less restrictive means exist to achieve the government's aesthetic goals, a total ban on portable signs satisfied the fourth prong of the Central Hudson text. 783 F.2d at 1540. The plaintiffs in the present case suggest that the City's aesthetic goals could instead be accomplished by more stringent enforcement of the City's prior portable sign regulations, or by the elimination of portable signs in residential areas only. However, as the Supreme Court recognized in Metromedia, "[i]f the city has a sufficient basis for believing that billboards ... are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508, 101 S.Ct. at 2893. See

also Supersign, 766 F.2d at 1532; Lindsay, 821 F.2d at 1111. Similar reasoning applies to the aesthetic problems caused by portable signs.[10]

The judgment of the district court is reversed.

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10 Because the regulation passes muster under the Central Hudson test, the plaintiffs' claim that the regulation violates the equal protection clause by discriminating between types of signs fails as well. See Posadas de Puerto Rico Assoc. v. Tourism Co., ____ U.S. ____, 106 S.Ct. 2968, 2979 n. 9, 92 L.Ed.2d 266 (1986).

APPENDIX H

MOBILE SIGN INC., Porta-Ad Ltd., Janice De Souza d/b/a J & M Sign Service, Michael Donovan, Mario Pappalardo, and New York State Sign Association, Plaintiffs,

v.

TOWN OF BROOKHAVEN, Defendant

No. 87 C 0757.

United States District Court, E.D. New York

Aug. 27, 1987

NICKERSON, District Judge.

Plaintiffs brought this action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring certain amended sections of the Code ("Code") of the Town of Brookhaven ("Town") unconstitutional and for a permanent injunction restraining the Town from enforcing them. Plaintiffs also seek attorney's fees pursuant to 42 U.S.C. § 1988. Plaintiffs claim that their rights have been violated

under 42 U.S.C. § 1983, and invoke the court's jurisdiction under 28 U.S.C. § 1331 and 1343 and under the Declaratory Judgment Act.

I.

Chapter 57A of the Code, adopted in 1979, among other things, regulates the use and display of "mobile signs" in the Town. Plaintiffs, three of whom are companies engaged in the business of renting and servicing mobile signs, contend that recent amendments to these regulations in effect ban mobile signs in violation of their rights under the first and fourteenth amendments of the Constitution of the United States, constitute an illegal impairment of their contracts, and deprive plaintiffs of property without just compensation. On application of plaintiffs the court on April 20, 1987 issued a temporary restraining order, enjoining the

Town from enforcing the amended provisions pending resolution of plaintiff's motion for a preliminary injunction. The court also gave notice of its intent, pursuant to Federal Rule of Civil Procedure 65(a)(2), to consolidate the preliminary injunction hearing with the trial on the merits. The parties, by letter dated April 23, 1987, agreed that the temporary restraining order would remain in effect pending the court's decision following the trial. The court tried the case on May 14, 1987.

The same parties were before the court about a year ago in a related action, Civ. No. 85-2896, to litigate the constitutionality of a 1982 amendment to the Code which would have completely prohibited all mobile signs in the Town as of October 1, 1985. In a memorandum and order dated June 20, 1986, the court

declared that ordinance, section 4G(1) of Chapter 57A of the Code as amended by Local Law 11 of 1982, unconstitutional and void.

Subsequently the Town, by Local Law 12 of 1986, amended Chapter 57A of the Code. Plaintiffs in this action challenge amended sections 4G(4), (5), (8) and (9), which provide as follows:

§ 57A-4. Signs permitted in business and industrial districts.

* * *

G. Mobile and Temporary Signs.

* * *

(4) Signs shall not be located on the same premises advertising the same business for more than 6 months in any given year. For the purposes of this subsection, the term "premises" shall mean an entire shopping center or commercial center.

(5) Fee for such mobile or temporary sign permit shall be $25.00 for one month. The applicant may apply for a permit for any length of time, in whole months, up to and including 6 months, if said sign is to remain unmoved at one location for the entire application period.

* * *

(8) Electrified signs shall be connected directly to an approved outdoor receptable within 6 feet of said sign, or shall be connected directly to the electrical system of the building or structure. All wiring shall be in accordance with the National Electrical Code. The use of extension cords suspended overhead or extending along driveways, walkways or the ground shall be prohibited.

(9) In an established shopping center, with defined parking stalls, mobile and

temporary signs shall be allowed in a legal parking stall, but in no event shall such sign be located closer than 8 feet to the edge of the road.... Local Law 12 also amended the definition of "mobile sign" in section 2 of Chapter 57A to read: "Any sign not designed or intended to be anchored to the ground and designed and intended to be capable of being transported over public roads and streets, whether or not it is so transported."

The prior definition had been more narrowly limited to those signs "directly mounted upon a trailer-type chassis...."

Previously, section 4G applied only to mobile signs. Local Law 12 amended it to cover both mobile signs and temporary signs (and added a definition of "temporary sign" to section 2). Because section 4 is designed as a listing of the types of signs that are permissible in the Town's

business and industrial districts, the inclusion of temporary signs in subsection G has the effect of increasing the variety of signs available for use in those districts.

II.

Plaintiffs' primary witness was Robert Pearl, the owner of plaintiff Mobile Sign, Inc. and an officer of plaintiff New York State Sign Association. He testified that his company owns approximately 140 mobile signs, which it rents primarily to businesses in need of temporary advertising, but also to religious, social and civic organizations wishing to communicate with the public. The signs incorporate changeable copy so that a customer can display any message it wants. Mobile Sign, Inc. services the signs it rents by repairing vandalism, changing burnt-out light bulbs, replacing missing letters, and, for some

customers, changing the copy as requested.

Thirty percent of Mobile Sign, Inc.'s total income is derived from the business it conducts in the Town. For plaintiff J & M Sign Service, according to the testimony of plaintiff Mario Pappalardo, this percentage is 95. Although no evidence was introduced about the business of plaintiff Porta-Ad Ltd., an affidavit submitted in support of the motion for the temporary restraining order represented that all of its income is derived from business conducted in the Town.

With respect to amended sections 4G(8) and (9), the Town's attorney proffered for the first time at trial constructions that plaintiffs' attorney agreed obviated their objections. The town's attorney represented that the requirements of the first and third sentences of section 4G(8), dealing respectively with outdoor recepta-

cles and extension cords, were intended to apply only to electrified signs that fail to comply with the National Electrical Code and, in particular, with its requirement that the internal wiring of outdoor portable signs be equipped with groundfault circuit-interrupters. The Town's attorney also stated that section 4G(9) does not mandate placing mobile signs in temporary parking stalls, but allows such placement as long as the section's eight-foot setback requirement is observed.

The court adopts these constructions of section 4G(8) and (9). This leaves for court resolution only those issues presented by amended sections 4G(4) and (5).

III.

Plaintiffs challenge amended section 4G(4) because it restricts the total

cumulative time a mobile sign may be located on the same premises advertising the same business to six months a year. Pearl testified that enforcement of this section will have a detrimental effect on Mobile Sign, Inc.'s business because some of its customers (in unspecified quantity) rent mobile signs for more than six months in a given year. Those customers resist using permanent signs with changeable copy instead because of higher initial costs and the need to maintain such signs themselves. Section 4G(4) as amended requires them to ascertain in advance how they will allot the permitted cumulative six-month use of a mobile sign.

Prior to its amendment in 1986, section 4G(4) restricted the display of mobile signs at a location to a maximum period of thirty days at a time and required a "sign-free" interval of at

least fifteen days between each such display period. According to Pearl the Town did not enforce this provision, and it did not affect his company's business. While the Town's sole witness, Chief Fire Marshal Joseph F. Sauerwein, testified that there was some enforcement of the provision, the court finds that this was so only occasionally.

Although the evidence shows that mobile signs are used for both commercial and noncommercial speech purposes, the language of amended section 4G(4) makes clear that the section regulates only mobile signs with commercial speech content. The six-month restriction is directed solely at signs "located on the same premises advertising the same business. Plainly the section does not cover signs that do not "advertis[e]" a "business."

Even if the section were ambiguous on this point, the court would adopt the narrower construction and hold the section regulates only commercial speech. The ordinance thus does not accomplish a total ban on mobile signs such the court invalidated in its June 20, 1986 memorandum and order. A total ban's effect on noncommercial speech was a significant factor in the court's determination that the Town had failed in its burden, under the standards enunciated in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), of showing that "a more narrowly tailored restriction, i.e., anything less than a total ban, would promote less well the achievement of a legitimate goal." Memorandum and order of June 20, 1986 at 4-5.

Were the six-month cumulative use allowance to apply to mobile signs with

noncommercial or ideological content, the court would have to consider whether the restriction was sufficiently akin to a total ban as to be unconstitutional.

For example, a person might wish to make an ideological statement at a particular premises where the six-month allotment of mobile sign display time had already been used. Under those circumstances the consequences for noncommercial speech of the six-month limitation might be indistinguishable from those of a total ban.

The standard by which to measure the constitutionality of section 4G(4) as a restriction only on commercial speech is the test set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563-66 (1980), and subsequent cases. See also Posadas de Puerto Rico Associates v. Tourism Co., 106 S.Ct. 2968, 2976 (1986). Under that

standard, commercial speech receives first amendment protection if it concerns lawful activity, is not misleading, seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. Metromedia, supra, 453 U.S. at 507.

Here there is no suggestion of misleading speech or unlawful activity. The promotion of aesthetics and traffic safety, presumably the objectives underlying amended section 4G(4), are substantial governmental interests. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984); Metromedia, supra, 453 U.S. at 507-08. Section 1 of Chapter 57A of the Code lists three objectives of the sign ordinance, two of which are "[a]voiding an unsightly proliferation of unnecessary signs," and

"[p]rotecting the public from improperly located or distracting signs...." Thus, the critical inquiries are whether the ordinance furthers the Town's interests and whether its restriction on speech is greater than is essential to further those interests.

Plaintiffs contend that the section does not advance the Town's purported aesthetic interests because customers can circumvent the restrictions by mounting a mobile sign on wooden posts. The result would be a "permanent" sign that is just as unappealing visually, but not subject to the six-month limitation. Moreover, because the section appears to permit a given mobile sign to remain for six months at one premises, and for an additional six months at a different premises, there is no net effect on the Town's visual appearance.

Plaintiffs also urge that because the section now permits the use of temporary signs in business and industrial districts for up to six months, whereas before it purported to prohibit them, the Town's professed concern for aesthetics cannot be taken seriously.

While these arguments have some plausibility, the court's role is to decide not whether the Town has chosen the best method for advancing its interest in an attractive environment, but whether the method chosen in fact advances that interest. It is true that merchants or business people may undermine in part the Town's aesthetic goals by converting their mobile signs into permanent signs by mounting them on permanent posts. But the record does not show that all such advertisers are likely to choose this route, or that plaintiffs, who are in the

business of renting signs, will agree to what amounts to outright purchases of their product.

The court will not predict that the Town is wrong in its legislative judgment that the ordinance, by pressuring merchants to acquire permanent signs for their longterm advertising needs, will improve the Town's appearance. Those merchants faced with the need to switch to a permanent sign might choose to invest in a sign more visually pleasing than their year-round mobile sign. The record shows that while to the lay person's eye not all permanent signs are more attractive than mobile signs, many are. Few seem to be less attractive.

Plaintiffs' argument that the ordinance does not affect the total net display time of mobile signs in the Town is unconvincing. There is no evidence that a mobile

sign that had been used for twelve months a year by a customer, and that now can be used by that customer for only six months a year, will find a different customer for the remaining six months. This might be the case if the demand for mobile signs outstripped their supply, but there is no evidence that this is likely.

The fact that the ordinance fails to regulate all equally unattractive mediums of commercial speech and ignores other available steps to enhance the Town's appearance is not generally a sufficient basis for finding that the ordinance does not advance its aesthetic objective if the Town reasonably restricted the scope of the ordinance. Taxpayers for Vincent, supra, 466 U.S. at 810-12; Metromedia, supra, 453 U.S. at 508-12. The Court in Taxpayers for Vincent, for example, said that an aesthetically motivated restric-

tion on speech might be deliberately underinclusive so as to afford adequate alternative opportunities for communication. 466 U.S. at 811 & n.28.

Here the Town, by allowing the use of mobile signs for up to six months a year and by including temporary signs in section 4G as signs permitted in the Town's business and industrial districts, has not gone as far as it might have in pursuing its aesthetic goals. But section 1 of Chapter 57A of the Code lists a third objective to the town's sign ordinance (in addition to those of promoting aesthetics and traffic safety): "Providing for adequate signs for the business community to communicate its availability to the public." The Town's underinclusive regulatory approach in section 4G(4) in terms of an aesthetic objective may well reflect this concern for the opportunity

of businesses to communicate their availability.

The court concludes that section 4G strikes a balance not manifestly unreasonable between the Town's competing objectives of promoting aesthetics and communication.

The court rejects plaintiffs' suggestion that the Town's proffered reasons for the amended ordinance are simply public rationalizations for impermissible purposes, to wit, the indirect accomplishment of a total ban on mobile signs and punishment of the mobie sign companies. There is no evidence that the Town acted with impermissible motives. A colloquy between the Town Supervisor and a Town resident at the public hearing on Local Law 12's passage is not to the contrary. One of the supervisor's responses, although it indicates her frustration and

disagreement with this court's decision of last year, can hardly be taken to represent the Town Board's motive in acting on the legislation.

The issue remains whether section 4G(4) restricts speech more broadly than necessary to promote the Town's aesthetic objective. The reasoning in Taxpayers for Vincent suggests that it does not. There, the Supreme Court held that a total ban on the posting of signs on public property was narrowly tailored to the City of Los Angeles' interest in eliminating visual blight because the medium of expression itself constituted the aesthetic harm. The Court noted that by "banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.

Here, it is evident that the proliferation of mobile signs in the Town's busi-

ness and industrial districts contributes to their unseemly appearance. Minimizing the time in which such signs can be displayed, under the logic of Taxpayers for Vincent, would necessarily be viewed as responding in a narrowly-tailored fashion to the substantive problem of concern. Id. at 808-10. Although Justice Brennan's dissent in that case, at 818-31, raises disturbing questions about whether this approach to the narrowly tailored inquiry sufficiently guards first amendment freedoms, this court is not free to reject the premise of the majority's opinion.

The court finds that amended section 4G(4) implements the Town's substantial interest in promoting its visual appearance and advances that interest without unnecessarily restricting commercial speech. As a result, the court need not address whether any safety objectives also

justify the amended section. See, e.g., Lindsay v. City of San Antonio, 821 F.2d 1103, 1110-11 (5th Cir. 1987).

IV.

The remaining trial issue is whether amended section 4G(5), requiring a monthly $25.00 permit fee for each mobile or temporary sign, is unconstitutional. Plaintiffs claim that the fee is punitive in nature and designed to discourage the use of their signs. They specifically charge that the fee is disproportionate to the fairly nominal one-time fee for permanent signs of 50 cents per square foot of sign area (but not less than $10.00) provided for in section 13 of Chapter 57A of the Code.

The Town responds that the $25.00 monthly fee reflects the higher administrative costs associated with mobile and temporary signs, and in particular the

need to conduct regular inspections to ensure compliance with safety and locational requirements. Because of their portability, the Town maintains that it must inspect the signs twice a month to ensure compliance with setback and other display regulations.

Trial testimony established that the previous permit fee for mobile signs, in effect and enforced since the initial passage of the Town's sign ordinance in 1979, was $16.00. The Town urges that after seven years inflation alone requires an adjustment of the fee to $25.00. But the Town also submitted a detailed breakdown of the administrative costs underlying the fee, showing a total cost of $24.12 per sign, per month. The breakdown is based on an inspection of each sign twice a month by one of four sign inspectors, who are part-time

employees of the Town's fire department. Other costs include secretarial and office expenses, travel expenses for the sign inspectors, and the supervisory time of a senior fire marshal.

Licensing or permit fees imposed on the exercise of first amendment rights generally are constitutional if they are designed only to cover the administrative costs involved in the license or permit. Gannett Satellite Information Network, Inc. v. Metropolitan-Transportation Authority, 745 F.2d 767, 774 (2d Cir. 1984); Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983). Plaintiffs did not in any way challenge the Town's breakdown of costs, although they might have contended that it assumes more inspections than are necessary or than are actually performed or provides for excessive salaries and

allotment of personnel.

Plaintiffs' witness Pearl testified that his company passes on the higher permit fee to the customer and thus has lost business. This is not a sufficient basis for invalidating the fee. Cf. Lubin v. Panish, 415 U.S. 709 (1974) (filing fee unconstitutional where it prevented indigent political candidate from running for office). Nor is the fact that the Town sees fit to charge a lesser, onetime fee based on square footage, for permanent sign permits. This disparity, by itself does not impeach the Town's breakdown of the costs underlying the mobile sign permit fee. The court finds amended section 4G(5) constitutionally valid.

V.

Plaintiffs' request for attorney's fees hinges on II whether, notwithstanding the court's failure to grant the full relief

sought, plaintiffs are "prevailing" parties within the meaning of 42 U.S.C. § 1988. This standard is met if plaintiffs succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."' Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). A specific judicial determination is not required. "[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."' Maher v. Gagne, 448 U.S. 122, 129 (1980) (quoting § 1988 legislative history, S.Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad News 5908, 5912). See also Gingras v. Lloyd, 740 F.2d 210, 212 (2d Cir. 1984) (issue is whether "plaintiff

has achieved some vindication of his rights as a result of the lawsuit").

Here, it is plain that as a result of plaintiffs' suit, the Town offered constructions of amended sections 4G(8) and (9) that it would not have otherwise. Indeed, as late as the argument on the motion for the temporary restraining order, the Town was adhering to interpretations of those sections that the court might well have determined were inconsistent with plaintiffs' first amendment rights. Accordingly, the court finds that plaintiffs are "prevailing" parties with respect to those claims and entitled to a reasonable attorney's fee.

The more difficult question is what is a reasonable attorney's fee. Plaintiffs cannot be considered "prevailing" parties with respect to their claims against amended sections 4G(4) and (5). Where

plaintiffs have not prevailed on all of their claims, the extent of their success is crucial to a determination of the proper amount of an award of attorney's fees. See generally Hensley v. Eckerhart, supra. The parties should brief this issue if they cannot first settle it among themselves.

VI.

The court declares that sections 4G(4), (5), (8) and (9) of Chapter 57A of the Code of the Town of Brookhaven, as amended by local Law 12 of 1986 and as construed herein, are constitutional. The temporary restraining order against defendant is vacated, and entry of a permanent injunction is denied. The court awards plaintiffs a reasonable attorney's fee and, unless they first reach a settlement, directs them to submit appropriate argu-

ment and proof as to the proper amount with 60 days hereof.

The foregoing constitutes the court's findings of fact and conclusions of law.

So ordered.

APPENDIX I

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil Action No. LR-C-86-227

A-DEAL, INC., Plaintiff

v.

CITY OF SHERWOOD, et al., Defendants

FINDINGS OF FACT & CONCLUSIONS OF LAW

BEFORE THE HONORABLE G. THOMAS EISELE,
United States District Judge.

APPEARANCES:

For the Plaintiff:
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Proceedings reported by machine stenography; transcript prepared by notereading.

PROCEEDINGS

THE COURT: I think I will decide it right now. The parties are pretty much in agreement as to the law and the cases that set the framework for the Court's decision. The Metromedia case is probably the last major pronouncement of the Supreme Court that we need to look at, but I want to mention for the benefit of counsel some other cases that I have read that I think are more direct and you probably considered them also. Seems like most of these cases have arisen out of Georgia and Florida. There is one judge that seems to have become a specialist. It's true that three of the cases were decided by one federal judge down in Orlando, whom I've not not met, but his name is Kovachevich.

MR. OWINGS: Kovachevich.

THE COURT: I'll take your word for it.

The cases that I'm talking about are Signs, Inc. of Florida v. Orange County, Florida. That's 592 F.Supp. 693, a 1983 case. April of 1983. Then All American Signs Rental, Inc. v. City of Orlando, a 1983 case, decided October 27, 1983, by the same judge. Then Harnish v. Manatee County, Florida, in the Tampa Division, decided March 30, 1984 by guess who? The same judge.

MR. HANKINS: Citation, if Your Honor please.

THE COURT: Yes, the citation is 597 F. Supp.601, 1984, Harnish v. Manatee County, Florida. The Georgia case, Dills v. City of Marietta, Georgia, from the Eleventh Circuit, 674 F.2d 1377, a 1982 case.

The last one deals quite specifically with time limitations upon the use of portable signs, which is the main thrust

of the plaintiff's attack here.

Let me just read a little bit from the opinion. It says: "Dills and Tucker, the plaintiffs, sought declaratory and injunctive relief to prevent defendants from enforcing two provisions of the Marietta Sign Ordinance which required the removal of portable display signs after a specified number of days. Plaintiffs challenged the ordinances on grounds that they constituted an unlawful impairment of contract, resulted in deprivation of property without just compensation and otherwise violated their rights of due process, equal protection and free speech."

The lower court held that the ordinances denied the plaintiffs equal protection of the law. "For the reason stated below, we affirm." Then they dealt with the procedural issue. Then moving on to the

issues we are talking about. "Having resolved the procedural issue we turn now to the question of whether the challenged provisions of the Marietta Sign Ordinance violate federal constitutional guarantees. Although plaintiffs assert several constitutional bases for relief, we focus, as did the district judge, on plaintiffs' claims based on the First and Fourteenth Amendments. The starting point of our inquiry is to examine the character of the ordinances as they affect constitutionally protected communication.

"Both regulations attacked by plaintiffs restrict the time period for use of portable signs: Ordinance No.-3315 permits use of portable signs for up to 120 consecutive days but then requires removal of the sign for 30 days before it may again be displayed, and Ordinance No. 3479 allows use of portable signs only twice a

year for a maximum period of 30 days. At a hearing before the district court, plaintiffs presented evidence that portable dislay signs offered the most economically efficient means of advertising available -- i.e., less expensive in relation to effectiveness than any other advertising method. Testimony was introduced to the effect that for a small business with low starting capital permanent signs were not affordable. Plaintiff Dills testified that both ordinances, but especially Ordinance No. 3479, sharply limited the use of portable advertising because short term leases of portable signs were not profitable." The same testimony on that latter score we find here.

"The Court below therefore concluded that the challenged ordinances impeded plaintiffs' commercial speech. On appeal

defendants do not challenge this conclusion, but instead argue that the burdens imposed on commercial speech by the portable sign ordinances were sufficiently justified by the municipality's interests in controlling certain noncommunicative aspects of the medium."

It goes into a discussion of Metromedia and then quotes from the Central Hudson case: "The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading." The Court notes that the defendants have acknowledged in their pretrial submission that the speech we are dealing with here, even the commercial speech, is lawful and is not misleading.

Then it goes on to say: "A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement

a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

"Employing this test in our review of the challenged Marietta ordinances, it is undisputed that the initial, requisite inquiry is fulfilled. The Marietta ordinances clearly encompass speech that is not misleading and that concerns lawful activity." That is the same thing here. "The remaining questions are, however, not so simply answered under the record before us.

"On appeal, and before the court below, counsel for defendents argued that the two challenged provisions of the Marietta Sign Ordinance were enacted to further the municipality's interests in traffic safety and aesthetics. Although it is well settled that substantial governmental

interest exists in the promotion of both these concerns, there is no support for the claims that city officials were concerned about aesthetics when enacting time restrictions on the use of portable signs. The Marietta Sign Ordinance is prefaced by a statement that the purpose of the various sign regulations is to safeguard life, public health, property and welfare."

Now here there is a provision in the preface that does mention -- let me find it. That is to promote the safety of the pedestrian and motoring public, and to preserve the natural beauty of the City of Sherwood and its locale.

Marietta Ordinance No. 3315 -- they cite that, "Such broad, all encompassing statements tend to frustrate judicial inquiry into the real purposes of a governmental entity in instituting a restruction on

protected activity. They permit after the fact rationalizations for regulations thereby allowing circumvention of the mandate that such measures be defended only on the basis of considerations actually contributing to their enactment. When all-inclusive statements of purpose are used we are forced to look in the record for evidence of the interest underlying a measure. Yet the district court found, and our review of the record confirms, an absence of any evidence that Marietta officials considered portable signs esthetically displeasing. We therefore decline to accept counsel's mere incantation of aesthetics as a proper state purpose in evaluating the challenged provisions.

"Unlike the asserted concern for aesthetics, a narrow reading of the general statement of purpose prefacing the

Mariettaas well as the obvious aim of most of the measures contained therein support defendants' arguments that concerns for traffic safety at least partialy provoked the restrictions on portable signs. But even accepting that when enacting the ordinances city officials sought to implement a substantial governmental interest, we are still unable to conclude that the remaining two requirements of Central Hudson test are met. The time restrictions imposed on the use of portable signs do not directly advance the claimed interest in traffic safety. Defendants introduced testimony by an officer of the City of Marietta Police Department that protable signs constitute a greater distraction to motorists than permanent signs. The officer explained that passersby become accustomed to permanent signs and ignore

them while a portable sign indicated something -- probably a special and drew attention."

This is exactly the testimony the mayor gave here in our case. "Under this reasoning Marietta's time restrictions on the use of portable signs do not directly further the claimed interest in traffic safety. In fact the ordinances' effect would be to exacerbate the distracting quality of portable signs by insuring that when a portable sign was used it indeed advertised something special. Citing Metromedia, defendants argue that its allowance of exceptions to a total ban on portable sign use did not denigrate the city's interest. While a governmental entity may legitimately decide to remedy a problem on a piecemeal basis, at some point exceptions can become so inconsistent with the claimed statutory purpose as

to render unreasonable any assertion that the measure furthers the claimed governmental interest.

"Marietta police officer also testified that temporary signs could blow over in severe weather and create electrical hazards. We again question whether time restrictions on portable sign use address this concern. These doubts are encouraged and the statute at least rendered overinclusive by the application of time restrictions to both electrical and non-electrical temporary signs. Finally, even as to electrical signs the problem can be solved through measures less restrictive of commercial speech, such as requiring anchoring of the signs (a requirement which the record indicates is imposed by other Atlanta area municipalities). Hence we conclude that under the record before us the time restrictions contained in

Ordinances 3315 and 3479 have not been shown to directly further, or to be narrowly tailored to meet, a claimed substantial governmental interest. The decision of the district court enjoining enforcement of these provisions is affirmed."

The All American Sign Rentals, Inc. v. City of Orlando also dealt with two requirements. One was a 400 foot setback and one limiting usage to 45 days on premises followed by 75 days off premises. The court went through the facts in that case, analyzed the Metromedia and then stated: "It is the Court's opinion that the City has not met this four-part test. In particular no evidence was introduced to justify the regulation in the face of its obvious restriction on the freedom of speech. Specifically, all the witnesses for the

City agreed that the distance requirement and the off-on requirement had no beneficial effect for public safety purposes or for aesthetic or beautification purposes. The City acknowledged that the existing regulationsmake the use of these signs safe within the City of Orlando and the City's current inspection practices insure that the signs are used properly and safely. The City's actual evidence presented on October 6, 1983 did not contain any rationalization or explanation for the City's legislative act requiring the 45 days and 75 days versus 60 and 30 on-off. No evidence was presented to support the 400 foot separation requirement when the evidence clearly establishes that the City requires only a 40 foot separation between permanent signs. Number five, in that the signs conform with the City's existing regulations concerning

permanent signs when mounted on poles rather than a temporary trailer, it is difficult to see how these signs interfere with the aesthetics of the community any more than any other sign. The evidence presented in this case establishes that the signs are in fact both extremely effective as a medium of expression and inexpensive to use. The portable trailer signs are particularly beneficial to political candidates and religious and social organizations that wish to advertise during a portion of the year but not on a full-time basis nor on a full-time basis so as to justify permanent signs. Businessmen testified that they received significant benefits from these signs. The City failed to present any evidence whatsoever to refute these beneficial aspects or to justify the City's desire to place limitations on the usage of these signs.

"The City states that portable trailer signs are but a single part of a comprehensive set of regulations insuring public safety and the character of the community (aesthetics). The public safety requirements of the regulations are not challenged in this instant action nor are the codes goals of public health, safety, and welfare or aesthetics challenged. It is that aspect of Chapter 58 of the Comprehensive Plan that singles out portable signs disadvantageously and unreasonably, arbitrarily and capriciously limits their use under the pretext of safety and aesthetics, while at the same time allowing billboards to be placed within the 200 feet of one another and permanent signs to be placed within 40 feet of one another. The evidence fails to show that this arbitrary, capricious and unreasonable limiting of portable signs implements a

substantial governmental interest, advances that interest, or reaches no further than necessary to accomplish that objective. It simply singles out portable signs regulating the on-off and separation requirements under the pretext of promoting the goals of health, welfare, safety and aesthetics."

Well, there's no reason to read all of the opinions. The Court here makes certain findings of fact. It finds that the City permits real estate signs to stay up a longer period of time than that provided in 3.07. It's not clear as to the City's practice with respect to churches and civic organizations, but there is some indication it does not enforce the provisions -- that is, the non-permit provisions -- of the ordinance against churches.

I might say in that respect we are not

dealing with a church plaintiff here, but it is not going to help the City much in terms of the chilling aspect of the ordinance. It cannot be cured by administrative decision not to enforce the literal language of an ordinance according to its actual terms.

The mayor has testified and I think Mr. Davis has testified that the main reason was safety, but there was some aesthetic objectives in the passing of the ordinance. The problem and the truth is that the evidence shows that signs almost identical to the portable signs are permitted if "permanently" affixed. This undermines essentially the entire basis of the argument that these signs should be banned for safety or aesthetic reasons when almost identical signs mounted, as we have seen from the evidence, are permitted.

There has been no comprehensive plan established by the City concerning the development of aesthetic values and their enforcement, of which this might be considered an integral part. No standards have been adopted for making judgments about what is appropriate to handle on an aesthetic basis.

Now, I don't think it's sufficient, for instance, to say -- and I think another one of these decisions here, the last one I mentioned, the Manatee case, it sometimes is easier for a city to ban altogether signs in a certain region or area of a commercial part of the city, and so forth. And it's usually probably safer to do that than to single out one type of sign and permit others.

But I don't want to suggest that can be done in the face of the First Amendment because the Manatee case is what happened

-- they did explicitly prohibit the erection or display I think of any signs. And yet it was held to be unconstitutional.

I think the mayor mentioned that portable signs were likely to be a bigger safety problem because they are put down and suddenly a person sees them for the first time, whereas a sign that he was driving by every day he becomes accustomed to. Of course, every sign is there primarily to get attention and the argument just cuts too far because if you leave it there longer and permit it to be treated like a permanent sign, then the same result would occur. In other words, it would be just like any permanent sign and insofar as it is true and signs that people are familiar with are ignored, then that's what would happen if these signs were treated similar to permanent signs.

Well, under the law it's conceded that we are dealing with commercial speech. Even assuming we are not going beyond that to more protected First Amendment speech, the City has agreed that the commercial speech involved concerns only lawful activity and is not misleading. That's the first part of Metromedia. And, yes, it is true that the City has stated that the ordinance was passed to further the legitimate objectives of safety and aesthetics and to advance those objectives. But the Court finds that Section 3.07 does not in truth advance those interests in light of what else is permitted under the statute.

In other words, it's because of the manner in which the statute is administered with respect to permanent signs, the singling out and special treatment of portable signs does not truly advance

those objectives of safety and aesthetics.

The Court also concludes that the ordinance -- that is, 3.07 reaches much further than necessary to accomplish any legitimate city interest in safety or aesthetics.

Now although I don't think it's necessary for the plaintiff in this type of case to establish that he's actually been damaged, the Court does find that the plaintiff has suffered some economic loss because of the ordinance and its enforcement. The enforcement policy under Ordinance 603 has not been consistent or evenhanded.

Now, where does it leave the City? It leaves the City, by the rulings of the Court, free to enforce the other provisions of Ordinance 603 other than 3.07 as to portable signs; essentially to enforce the other provisions as portable signs in

the same manner they are applying them to permanent signs. And I think because we did not permit an amendment to the complaint we are not going to deal with the issue of the fees charged under 6.02. Essentially that is going to be -- since the rest of the ordinance stands, we are not declaring the whole ordinance unconstitutional, that is a provision which calls for an interpretation of state law, under state law, of the ordinance.

I would suggest to the defendants that they might want to look to see if the ordinance justifies the actual fee practices, at least as they are spelled out in the amended complaint. That's just kind of gratuitous advice because that's not before me. And the same little gratuitous advice I'm going to give although it's not before too, is that they may want to look at the term "political sign" and

3.02(d) since most of your political exception turns on an actual election. Something that people may do before and after an election. And political First Amendment speech, which is protected higher than commercial speech, is not limited, of course, to that type of political activity relating to issues on a ballot or to people on a ballot. So, you know, that's something that you may want to think about.

But so far as -- the only challenge this particular plaintiff is making, since we didn't accept the amended complaint, is to Section 3.07 which relates to temporary or portable signs, and the Court is holding that provision as unconstitutional and may not be applied. The ordinance has a severability clause, and it's easy to sever that without doing any damage to the rest of the ordinance. Assuming the City wants

to continue to enforce the other provisions, it's certainly free to do so in the light of the Court's ruling.

Let me ask the plaintiff is there any other issue? It seems to me the only issue you are raising or that I have agreed to take is this 28-day or in effect five days, two days, four times a year provision of the ordinance; is that correct?

MR. OWINGS: That's correct, Your Honor.

THE COURT: I don't see that the issue is very much in doubt. As I have indicated, the law seems to be quite clear. And if you read it, I think you will agree. In any event, I am convinced, and so that that will be the ruling of the Court.

Anything else?

Court will be in recess.

(At 12:15 p.m. the above-entitled

proceedings were concluded.)

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C E R T I F I C A T E

I, Carolyn S. Fant, Official Court Reporter, do hereby certify that the foregoing is a true and correct excerpt of proceedings in the above-entitled case.

/s/ Carolyn S. Fant
Date: 8/26/87